A TREATISE

ON THE LAW OF

BANKS AND BANKING.

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THIRD EDITION.

REVISED AND RE-ARRANGED, AND GREATLY ENLARGED,

By FRANK PARSONS.

Vol. II.

BOSTON:
LITTLE, BROWN, AND COMPANY.
1888.

University Press:
John Wilson and Son, Cambridge.

CHAPTER XXXI.

PRESENTMENT OF CHECKS FOR PAYMENT.

§ 420. Analysis.

Notice of Dishonor, § 428. See a condensed statement of the general law of presentment, §§ 258, 259.

A. Period of Presentment.

The fundamental rule is, that presentment must be made within a reasonable time under all the circumstances.

§ 421. In the absence of agreement or special circumstances, usage, now recognized as law, has fixed the rule that presentment must be made within banking hours of the first business day following the delivery of the check, if the bank is in the place where the payee lives or does business; if not in the same place, then the check must be forwarded for collection upon the business day following the day of receiving the check. If a check is received on Sunday, or other non-secular day, then the business day following is considered the day of receipt. Standard period.

Special Circumstances

§ 421 *i.* (1) Hastening.

(*a*) If the payee knows that the drawee bank is in a failing condition, it is his duty to present as soon as, by ordinary diligence, is possible, and not to wait till the next day.

(*b*) An agent for collection must present the check the same
§ 421 *a.* day it is received, not in order to hold the drawer of the check, but to hold the indorsers, &c. on the paper collected. See § 428.

(2) Excusing delay.

§ 423. Infrequent mail.

Draft intended to circulate.

Distance from bank.

§ 424. Clearing-house usages, and a usage of merchants to do business with reference to the clearing-house.

B. Holder *v.* Drawer.

§ 421. In order to hold the drawer absolutely, presentment must be made within the period set forth in A above, unless circumstances dispense with demand altogether; and it makes no difference through how many hands the check may go, the presentment must be made within this period in order to hold the drawer, whether it be made by the first or the hundredth holder.

§ 421 *d.* But delay in presentment will only discharge the drawer so far as he is actually damaged by it.

§ 425. At some time before suit against the drawer presentment must be made, unless dispensed with.
Circumstances dispensing with presentment altogether before suit.
(1) Agreement to waive formalities, express, or implied from conduct or words.
(2) Part payment by drawer before or after check is due.
(3) Bank's insolvency, or stoppage, or an injunction upon it.
(4) If drawer had no funds. § 421.
(5) When check is given as evidence of loan.
§ 426. The first presentment for payment will be a discharge of the drawer, if the bank offers to pay and the holder refuses; but presentment for inquiry as to signature merely will not have this effect.
C. Holder *v.* Indorser.
§ 421. As between each indorser and subsequent parties, the same period for
§ 422. presentment is allowed, measured from the contract of indorsement, but with the difference that unexcused failure to present within the standard time absolutely discharges the indorser, whether he is injured by the delay or not (Massachusetts, however, holding that an indorser, like the drawer, is bound if not prejudiced by delay).
§ 427. D. Presentment by Mail.

§ 421. **Period of Presentment. — Holder v. Drawer.** — In the absence of agreement or special circumstances it is the right of the drawer of a check to expect it to be presented for payment at latest within banking hours on the day following the day of its delivery to the payee, if the bank on which it is drawn be in the same place where the payee lives or does business; if the bank be not in such place, then the check must, within the same time, be put in due course for presentment, either by being sent by mail to the drawee, or by being deposited for collection with a banker, according to the ordinary custom of such business in that place.[1] But the holder does not gain an extra day for presentment by depositing the

Business hours of day following receipt.

[1] § 421. Simpson *v.* Pacific Mutual Life Ins. Co., 44 Cal. 139; Cromwell *v.* Lovett, 1 Hall, (N. Y.) 56; Veazie Bank *v.* Winn, 40 Me. 62; Boddington *v.* Schleucher, 1 Nev. & M. 540; s. c. 4 B. & Ad. 752; Moule *v.* Brown, 4 Bing. N. C. 266; Smith *v.* Janes, 20 Wend. 192; O'Brien *v.* Smith, 1 Black, 99; Smith *v.* Miller, 43 N. Y. 171, 176; Taylor *v.* Sip, 1 Vroom, 284; Ritchie *v.* Bradshaw, 5 Cal. 228; Bickford *v.* First National Bank of Chicago, 42 Ill. 238; Strong *v.* King, 35 Ill. 9; Wear *v.* Lee, 87 Mo. 358; Cawein *v.* Browinski, 6 Bush, 457; Himmelmann *v.* Hotaling, 40 Cal. 111; Schoolfield *v.* Moon, 9 Heisk. 171; Kelty *v.* Second National Bank, 52 Barb. 328; Syracuse, Bing., & N. Y. R. Co. *v.* Collins, 57 N. Y. 641.

check in his bank for collection. If the payee of the check receive it on Monday and deposit it in his bank, presentment must still be made in the same place, or the check forwarded to any other place where the drawee bank is, by the payee's bank (as by himself) during banking hours on Tuesday.[2]

(*a*) When a check is taken instead of money by one acting for others, a delay of presentment for a day, or for any time beyond that within which by reasonable diligence it can be presented, is at the peril of the party so retaining the check, as between him and the true owners and parties in interest represented by him. Thus where the payee of a draft took from the drawees their check for the amount, which during banking hours on that day would have been honored, but which was retained by the payee until the day following, when it was dishonored, it was held that the payee could not have any remedy against the drawer. As between the payee and the drawee the presentment of the check had been made with due promptitude; but as between the payee and the drawer there had been laches by reason of the payee not having presented the check and reduced it to money on the same day on which he received it. The payee had in fact, so far as the drawer was concerned, given to the drawees an extension of credit for one day, and the payment had been lost directly in consequence of such unauthorized extension.[3] (See § 428.)

An agent taking a check must present the same day, if possible by reasonable diligence.

(*b*) 1. All drafts foreign or inland must be presented to the drawee within a reasonable time, and in case of nonpayment prompt notice must be given to the drawer and indorsers. What is a reasonable time depends on the circumstances of each case, and is sometimes a very difficult question.[4] The relations of the parties, the time, mode, and place of receiving the check, must be considered,[5] and whether the check is post-dated or not.

Reasonable time a question of fact in each case.

[2] Alexander *v.* Burchfield, 1 Carr. & M. 75; s. c. 7 Man. & Gr. 1061.

[3] Smith *v.* Miller, 43 N. Y. 171; Chouteau *v.* Rowse, 56 Mo. 65.

[4] Montelius *v.* Charles, 76 Ill. 303; Stevens *v.* Park, 73 Ill. 387; Mohawk Bank *v.* Broderick, 10 Wend. 307; Allen *v.* Kramer, 2 Brad. 209.

[5] Woodruff *v.* Plant, 41 Conn. 344.

(*c*) 2. The drawer[6] cannot (except by agreement or under special circumstances as above) be held absolutely beyond the business hours of the day following his delivery of the check, if the bank is in the same place, or if the bank is an another place, the period of his liability will be until the close of business hours on the first secular day following the receipt of the check by some one in the bank's locus, the check having been mailed upon the day following its delivery by the drawer.[7] This period of absolute liability cannot be extended by circulating the paper; the tenth holder cannot hold the drawer unless he presents within this period measured from the delivery by the drawer, and not from his own receipt of the check, any more than the first holder.

Period of drawer's absolute liability.

(*d*) But failure to present within this period does not release the drawer entirely, but only so far as damaged.[8] Though the drawer has the right to expect presentment for payment to be made within the period aforesaid, yet his obligations will be affected by a breach of this duty only under peculiar circumstances. The check which he delivers is only a means whereby

The drawer is discharged by delay only so far as damaged by it.

[6] See Collection, § 213, and cases below.

[7] Werk *v.* Mad River Valley Branch Bank, 8 Ohio St. 301; Bickerdike *v.* Bollman, 1 Term, 405.

[8] Syracuse, Bing., & N. Y. R. Co. *v.* Collins, 3 Lans. 32; 57 N. Y. 641; Scott *v.* Meeker, 20 Hun, 161; Beeching *v.* Gower, 1 Holt, 313; Church *v.* Farnham, 1 Sheld. 393; Woodin *v.* Frazee, 38 N. Y. Super. Court, 190; Warrensburg Co-operative Building Association *v.* Zoll, 83 Mo. 94; Cogswell *v.* Rockingham Ten Cents Savings Bank, 59 N. H. 43.

Where the bank suspended payment on the day following delivery of the check, the holder recovered from the drawer, though the check was not presented until nearly five months after date. Morrison *v.* McCartney, 30 Mo. 183.

No negligence of holder is a defence if the drawee made no provision to meet the check or has withdrawn his funds. Linville *v.* Welch, 29 Mo. 203; Adams *v.* Darby, 28 Mo. 162; Moody *v.* Mack, 43 Mo. 210.

The burden is on the holder to show that the drawer has suffered no loss by the delay. Little *v.* Phœnix Bank, 2 Hill, 425. See Stevens *v.* Park, 73 Ill. 387; Griffin *v.* Riblet, 6 N. Y. Leg. Obs. 421; Gregg *v.* George, 16 Kans. 546; Mordis *v.* Kennedy, 23 Kans. 408; Jones *v.* Heiliger, 36 Wisc. 149 (1874); Henshaw *v.* Root, 60 Ind. 220 (1877); Griffin *v.* Kemp, 46 Ind. 172.

he seeks to enable the payee to obtain payment. As a general rule, it does not acquit him of his indebtedness, but is only evidence of that indebtedness. It may be held, therefore, for any indefinite period, short of the running of the Statute of Limitations, by the payee or by any subsequent assignee, and if not ultimately paid by the bank upon presentment and demand, it still remains as evidence of the unsatisfied debt.[9] This rule is subject only to one limitation; viz., that, if by the delay in presentment the drawer has suffered any injury, he shall be absolved at least to the extent of such injury. The most natural form for such injury to take is where the insolvency of the bank, intervening between the proper time of presentment and the actual time of presentment, has caused the dishonor of a check which would otherwise presumably have been duly paid upon demand.[10] Where the drawers withdrew their deposit on the 10th, the bank failing afterward on the same day, the drawers were held to pay a check drawn on the 2d, though the funds had been sufficient all the mean time.[11]

(*e*) The true doctrine is that the check-holder has a right to the deposit wherever it goes, equal to that of the other creditors of the bank, and only subordinate to the right of a *bona fide* purchaser for value obtaining priority by possession or presentment.

(*f*) The burden of proof on the holder to show that the drawer was not injured by delay is shifted, if it is shown that the drawer withdrew the funds, or that the drawee was solvent at the time of presentment.[12] Burden of proof.

[9] Cruger *v.* Armstrong, 3 Johns. Cas. 5; Conroy *v.* Warren, id. 259; Murray *v.* Judah, 6 Cow. 490; Mohawk Bank *v.* Broderick, 10 Wend. 306; 13 id. 133; Little *v.* Phœnix Bank, 2 Hill, 425; Pack *v.* Thomas, 13 S. & M. 11; Harbeck *v.* Craft, 4 Duer, 122; Bickford *v.* First National Bank of Chicago, 42 Ill. 238; Robinson *v.* Hawkesford, 9 Q. B. 52; Mullick *v.* Radakissen, 28 Eng. L. & Eq. 94; Alexander *v.* Burchfield, 7 M. & G. 1067; Serle *v.* Norton, 2 Moody & R. 401; Laws *v.* Rand, 3 C. B. N. S. 442; Story on Promissory Notes, Sharswood's ed., pp. 680, 683.

[10] Willetts *v.* Paine, 43 Ill. 433; and cases in preceding note.

[11] Kenyon *v.* Stanton, 44 Wisc. 479 (1878).

[12] Planters' Bank *v.* Merritt, 7 Heisk. 177.

Protest.

(*g*) A dishonored check need not be protested to bind the drawer.[13]

(*h*) If the drawer has no funds at the date of the check, or at the date of presentment, the drawer remains liable notwithstanding the lapse of time.[14] Neither delay in presentment or notice releases the drawer, for he is not in such cases injured by it. To relieve the drawer when he has withdrawn the funds would be to allow him to keep both the deposit and the consideration of his check, and thus take advantage of his own wrong;[15] and to release him when he had no funds in the first place would enable him to make money by fraud, and give him the consideration of the check, when he has rendered no equivalent nor taken any risk on account of it. If the drawer stop payment of the check, he is not entitled to notice of nonpayment.[16]

No funds.

(*i*) Neglect of the holder to present a check on the very day of its drawing is no defence to the maker, *unless the holder knew the bank was in a precarious condition.*[17] A collecting bank retaining a check four days was held liable for the loss consequent, and the depositor's subsequent promise to pay the amount was *nudum pactum.*[18] A holder who retains a check after it is refused payment, and fails to notify the drawer, must shoulder the loss himself.[19] Delay of seven days in presentation of a debtor's check discharged the surety.[20] A company's treasurer must present a check received from the State within a reasonable time, like any other

[13] Henshaw *v.* Root, 60 Ind. 220; Griffin *v.* Kemp, 46 Ind. 172.

[14] Foster *v.* Paulk, 41 Me. 428; Shaffer *v.* Maddox, 9 Neb. 205; Sterrett *v.* Rosencrantz, 3 Phil. 54; Fitch *v.* Redding, 4 Sand. 130; Bell *v.* Alexander, 21 Gratt. 1; Case *v.* Morris, 31 Pa. St. 100, 104; Fletcher *v.* Pierson, 69 Ind. 281; Bond *v.* Farnham, 5 Mass. 120; Franklin *v.* Vanderpool, 1 Hall, 78.

[15] Moody *v.* Mack, 43 Mo. 210; Deener *v.* Brown, 1 MacArthur, 350.

[16] Purchase *v.* Mattison, 6 Duer, 587.

[17] First National Bank of Charlotte *v.* Alexander, 84 N. C. 30 (1881).

[18] Bank of Greensboro *v.* Clapp, 76 N. C. 482 (1879).

[19] Clark *v.* National Metropolitan Bank, 2 McArthur, 249 (1875).

[20] Figley *v.* McDonald, 89 Pa. St. 128 (1879).

holder, or bear the loss.[21] Forty days in this case intervened between the reception of the check and the bank's insolvency.

§ 422. **Indorser absolutely Discharged by Unexcused Delay beyond the above Period, though not Prejudiced thereby; Massachusetts contra as to the last Clause.** — The rule as to presentment, as between the holder and the drawer of the check, is different in one respect from the rule as to presentment as between the holder and an indorser. For whereas presentment may be delayed for almost any length of time, and the drawer may still be held if he has suffered no prejudice by reason of the delay, on the other hand an unreasonable delay will discharge the indorser, even though he does not appear to have suffered any prejudice thereby. It was so held in the case of the Mohawk Bank *v.* Broderick, where the delay was from January 14 to February 6, there being a daily mail between the place where the check was delivered and the place where the drawee bank was established. Yet it appeared that the check would not have been paid had it been duly presented, since the drawer's account was then overdrawn, and continued so thereafterward until the presentment; nor was the drawer solvent at the time when the check was dated. The only intimation that the indorser might have suffered any loss by reason of the delay is to be sought in the statement that, though the drawer was insolvent at the date of the check, yet no other of his debts were due at this time. It is conceivable, therefore, that had the check been duly presented, and notice of dishonor duly given to the indorser, he might have exacted payment even from the insolvent drawer. But though this circumstance is noted in the statement of facts, it is not adverted to by the court in their opinion and cannot be presumed to have formed the basis of that opinion. On the contrary, the opinion is based, both in the Supreme Court and afterward in the Court of Errors, upon the broad statement of the principle of law, that the indorser of a check is discharged by unreasonable delay in presentment.[1] It is not to

[21] State *v.* Gates, 67 Mo. 139.

[1] § 422. Mohawk Bank *v.* Broderick, 10 Wend. 304; s. c. in the Court of Errors, 13 id. 133.

be supposed that the indorser intends to assume a liability indefinite as to time, and that he contemplates that the check will remain in circulation, keeping his responsibility alive for a period and circumstances not known to him and not anticipated when the liability was undertaken.[2]

This case followed the earlier case of Murray *v.* Judah,[3] wherein Judge Sutherland had remarked, "As between the holder of a check and an indorser or third person, payment must be demanded within a reasonable time," — contradistinguishing this from the case as between the holder and drawer.

An indorser has a right to demand and notice within the same period as the drawer, but measured from the issue of the check by the indorser, and, unlike the drawer, the indorser is absolutely discharged by failure.[4] The indorser of a check drawn for his own accommodation is really the primary party; he is the one who should provide funds to pay the check, and he may be held without notice of nonpayment unless injured by the neglect.[5]

A draft wherein some unknown person had altered the date, name of payee, and amount, was presented for sale at a bank by a stranger, accompanied by P., who wrote his name thereon as an accommodation indorser. The bank bought the draft. In an action by the bank against P.'s executor, held that P. had the rights of an indorser, and in absence of notice and demand was not chargeable.[6]

In Massachusetts, however, a contrary doctrine has been asserted, and the right of the indorser has been limited to having presentment made within such a period that he does not appear to have suffered loss by the delay.[7] But who can ever say with certainty, that the indorser has not suffered such loss? In the case at bar it was assumed that he had not, because the check was not good

Mass. holds indorser not discharged by delay unless damaged.

[2] Little *v.* Phœnix Bank, 2 Hill, (N. Y.) 425.
[3] 6 Cow. 484.
[4] Aymar *v.* Beers, 7 Cow. 705.
[5] Williams *v.* Hood, 1 Phila. 205.
[6] Susquehanna Valley Bank *v.* Loomis, 85 N. Y. 207.
[7] Small *v.* Franklin Mining Co., 99 Mass. 277.

at the time he indorsed. But he then supposed it to be good, and had he speedily learned (as he would have done in case of diligent presentment and notice) that it was bad, it is impossible to say, and certainly is not for the court to undertake to say, that he might not have taken some steps to save himself.

§ 423. **Special Circumstances excusing Delay.** — A. received a check on Wednesday, the first mail closed Thursday morning at 7½ A. M. (that was held an unseasonable hour at that time of year, February 23) and the next one went Saturday morning, arriving in Wheeling, where the check was payable, between 11 and 12 A. M. The bank failed Saturday noon. Held that the payee was not bound to mail by the Thursday post, nor to cause the check to be presented before noon on Saturday, as if sent to a bank to collect by the Saturday mail they would not probably have presented it before noon, that being some time before the regular closing hour on Saturday.[1] (See § 425.)

Mail infrequent. 7½ A. M. unseasonable.

A draft issued by a New York bank, and intended to circulate as money, was given to a ticket agent on deposit to secure certain excursion tickets until the depositor could decide whether or not he wished to go. The deposit was on the 9th, the excursion was to start on the 14th, and the agent forwarded the draft on the 15th, the morning after the decision was notified to him and the tickets bought. Held that the delay was not unreasonable under the circumstances, and did not discharge the indorser, although in the case of private drafts not intended to circulate as money such delay would be unreasonable.[2]

Six days held not unreasonable delay in presenting draft intended to circulate as money.

If the condition of the country, removal of bank, or other matter, prevent due presentment, the holder should notify the drawer, and offer to return check.[3]

Friday afternoon a small check was given to F., twenty miles from the bank. F. had to be at his business, twenty-

[1] § 423. Cox *v.* Boone, 8 W. Va. 500.

[2] Nutting *v.* Burked, 48 Mich. 241 (1882).

[3] Purcell *v.* Allemong, 22 Gratt. 739.

seven miles the other way, on Saturday, so did not leave the check for collection till Monday. The drawee failed early on Monday. Held the delay did not discharge the debt for which the check was given.[4] If the holder is disabled, he may yet present by mail.[5] A verbal agreement between drawer and payee, at time of execution and delivery of a check, that it shall not be presented till a certain time, excuses delay till such time.[6]

§ 424. **The Clearing-house has not in general changed the Rules of Presentment. But Usage is beginning to assert a Variation in Favor of Clearing-house Routine.** — The drawer of a check, after demand upon the drawee and refusal, is not discharged because of failure to present the check at the clearing-house, in accordance with mercantile usage, although, had it been so presented, it would have been paid.[1]

A custom among banks to do business through the clearing-house does not do away with the necessity of presenting a check to the bank on which it is drawn at least during banking hours of the next succeeding day.[2]

(*a*) **But by Local Usage in Maine** it seems that the usage of business by which checks received are deposited in the bank of the merchant receiving them on the day of reception if possible, but if the bank is closed then on the day following, the depositary collecting each day through the clearing-house all checks deposited upon the day preceding, is reasonable, uniform, and so general as to be presumably known; and drawers of checks are held to contract in reference to this usage,[3] and are therefore not relieved until the second day after delivery, unless such delivery is early enough in the day to allow of depositing the check that same day by ordinary diligence.

This seems eminently reasonable and just, and will soon

[4] Freiberg *v.* Cody, 55 Mich. 108.

[5] Bell *v.* Alexander, 21 Gratt. 1.

[6] Pollard *v.* Bowen, 57 Ind. 232 (1877).

[1] § 424. Kleckamp *v.* Meyer, 5 Mo. App. 444 (1878).

[2] Rosenblatt *v.* Haberman, 8 Mo. App. 486 (1880).

[3] Marrett *v.* Brackett, 60 Me. 527; Williams *v.* Gilman, 3 Green, 276; Leach *v.* Perkins, 17 Me. 462.

be recognized as law, we have no doubt; though in Missouri it is held that the custom of banks to do business through the clearing-house cannot affect the period of presentment.[4]

§ 425. **Presentment is necessary at some Time before Suit against Drawer, unless it would be useless, or is waived.** — The payee, by receiving the check, impliedly binds himself to have presentment duly made before resorting to any other means of procuring or compelling payment. Accordingly, it has been held that a creditor accepting a check will not be permitted to maintain an action against the drawer upon the original debt until after he has caused the check to be properly presented at the bank and payment demanded; and also, it is said, has caused the drawer to be notified of the dishonor.[1]

Presentment, however, may be altogether dispensed with, provided that, if made, it could not at the time be legally and properly met by the bank with a payment.[2] For example, it seems that knowledge of the banker's bankruptcy and stoppage,[3] or a public and notorious injunction, issued against the bank under a statute providing for the winding up of insolvent banks,[4] will excuse non-presentment. Neither need notice of dishonor be given to the drawer where the refusal to pay is made because the drawer has no funds in the bank.[5] Though it would seem reasonable that it should be shown

[4] Rosenblatt *v.* Haberman, 8 Mo. App. 486; Davis *v.* Benton, 2 West. L. Mo. 434.

[1] § 425. Cromwell *v.* Lovett, 1 Hall, (N. Y.) 56; Murray *v.* Judah, 6 Cow. 484; Gough *v.* Staats, 13 Wend. 549; also the cases below, by establishing exceptions to the general rule, acknowledge its correctness.

[2] Conroy *v.* Warren, 3 Johns. Cas. 259; Mohawk Bank *v.* Broderick, 10 Wend. 304; 13 id. 133; Gough *v.* Staats, 13 id. 549; Daniels *v.* Kyle, 1 Kelley, 304; Elting *v.* Brinkerhoff, 2 Hall, 459.

[3] Camidge *v.* Allenby, 6 B. & C. 373, explained in Robson *v.* Oliver, 10 Q. B. 704. But Grant says that even in such case presentment is customary: Grant on Banking, ed. 1873, p. 74; and see In re East of England Banking Co., 4 L. R. Ch. 14.

[4] Cromwell *v.* Lovett, 1 Hall, (N. Y.) 56.

[5] Morse *v.* Massachusetts National Bank, 1 Holmes, C. C. 209; Carew *v.* Duckworth, L. R. 4 Exch. 313.

that he had no reason to expect that there would be funds there.[6]

Part payment by the drawer before or after the check becomes due makes it unnecessary to make demand on the bank before bringing suit. But the holder cannot evade demand by voluntarily giving credit for a part payment, unless the drawer accepts and admits such credit.[7]

Regular presentation may be waived by conduct or representations;[8] any agreement, express or implied, will excuse want of the usual formalities.[9] Agreement that check shall be sent to another place to be cashed may enlarge the time of presentment; a reasonable time under the circumstances will be allowed.[10] A check given as evidence of a loan to the drawer need not be presented to the drawee.[11] A loan was made, and instead of an ordinary note or receipt a check was given for the amount, and was indorsed by a third party, who had knowledge of the character of the transaction, and wrote, besides his name, the words "waiving demand and notice"; it was held that the indorser was liable, although about thirteen months elapsed between the issuing of the check and its presentment for payment, during which interval the maker had become insolvent.[12]

Demand may be waived.

§ 426. **The First Presentment for Payment fixes the Drawer's Rights.** — If a check be presented for payment, and the bank is ready and offers to pay, but the payee for his own convenience declines to receive payment immediately, the drawer is thereby discharged, even though the check be subsequently presented,

[6] Carew *v.* Duckworth, L. R. 4 Exch. 313; Grant on Banking, ed. 1873, p. 105.

[7] Levy *v.* Peters, 7 Serg. & Raw. 125.

[8] Compton *v.* Gilman, 19 W. Va. 316; Devendorf *v.* West Virginia Oil Land Co., 17 W. Va. 135; Franklin *v.* Vanderpool, 1 Hall, 78.

[9] Holmes *v.* Roe, 28 Northw. R. 864; Woodruff *v.* Plant, 41 Conn. 344.

[10] Stephens *v.* McNeill, 26 Barb. 651.

[11] Currier *v.* Davis, 111 Mass. 480.

[12] Emery *v.* Hobson, 62 Me. 578; but see Veazie Bank *v.* Winn, 40 id. 62. See also Emery *v.* Hobson, 62 Me. 578; Woodman *v.* Thurston, 8 Cush. 157.

still within the proper period, and be then dishonored by reason of the failure of the bank. In the case cited, when the first presentment for payment was made the bank offered to pay; but the payee, for some reason of his own, seems to have changed his mind and determined not to take the money at once. The second presentment for payment was afterward made within the proper time, i. e. during banking hours on the next day following that on which the drawer delivered the check to the payee, and an effort was made in argument to show that the drawer undertook that the check should be honored any time during banking hours on that day. But the court said that his undertaking was only that the check should be paid whenever it should first be presented for payment within that period. Had the first presentment been, not for payment, but for some other specific object, e. g. an inquiry as to the genuineness of the signature, the dishonor upon the subsequent presentment (being the first presentment *for payment*) might have held the drawer.[1]

§ 427. **Presentment by Mail.** — It is sufficient presentment and demand to send the check through the post-office to the bank on which it is drawn.[1] Though precisely what is the duty of the bank, receiving the check through this channel, in order to honor or to pay it, does not seem very clear. The ordinary course of business could only hold a bank to pay cash over the counter, or to pay through the routine of the clearing-house, neither of which methods would seem a practicable response to such a demand as the foregoing. (§ 236.)

§ 428. **Notice of Dishonor.** — If the residence of the party to be notified is unknown, the time is extended during reasonably diligent inquiry, and if this is fruitless, no notice need be given.[1] Residence unknown.

If a party has himself received notice, and his liability is

[1] § 426. Simpson *v.* Pacific Mutual Life Ins. Co., 44 Cal. 139.

[1] § 427. Hare *v.* Henty, 10 C. B. N. S. 65; Bailey *v.* Bodenham, 16 id. 288; Prideaux *v.* Criddle, L. R. 4 Q. B. 455.

[1] § 428. Farwell *v.* Curtis, 7 Biss. 160. See Bailey *v.* Bodenham, 12 W. R. 865.

Notice by one whose liability is fixed enures to the benefit of others.

fixed, so that on payment he will be entitled to reimbursement, he may notify other parties, and such notice will enure to the benefit of all other parties to whom the one notified is liable on the paper.[1]

The payee or his agent cannot enlarge the time by taking a check instead of demanding cash upon the proper day.

A. gave B. a draft upon the 5th, drawn on the C. Bank; B. sent it by post to C. on the 5th, telling him to remit. The draft reached C. on the 7th, and on the same day C. sent a check for the amount. It reached B. on the 9th, and on the 10th B. tried to collect, but the check was refused. On the next business day, the 12th, he gave A. notice of dishonor. Held, that B. was guilty of laches, discharging A.[1]

For, by the usual method, viz. sending draft by express, or to some one (not the drawee) to collect (even if not sent till last mail of the 6th), it ought to have reached C.'s town on the 7th, and have been presented on the 7th, (as indeed it was, if the demand by letter was good,) and, if not paid, notice should have been sent to B. by mail of the 8th, and to A. by mail of the 10th at latest. The payee (or his agent) cannot enlarge the time by taking a check instead of money, and waiting till next day to see if it is good. If he takes a check, he must collect it the same day; he cannot have until the next day to present the check, for it was his duty to secure payment on *that* day, not the next day, and a check is not payment.

So here, waiving all other questions, B. received the check on the 9th, and waited until the 10th to present it, and until the 12th to give notice, thus enlarging the time for notice of dishonor two days; for, by law, notice should have been sent by him to A. on the 10th at least, as the return mail had not brought him the money, but a check.

CHAPTER XXXII.

PAYMENT OF CHECKS.

§ 430. Analysis.

A. Duty of Bank.

When there is presented in banking hours [431] a properly signed [432-440] check, that is not stale [441-443] or otherwise open to suspicion, [444] and the bank has available funds sufficient [445] to meet the check, and the case fulfils the other conditions named in § 310, it is the duty of the bank to pay the check in "good money"; and if it refuses, it will be liable to a suit by the drawer, and in some States the holder also may sue; but if, for any reason, the case is not a clear one, the bank may properly take time to inquire, stating that its refusal is qualified, not absolute, and reserving funds from subsequent demands until the case is inquired into.

(1) Signature.

§ 432. The bank should require the signature to be identical with the credit on its books.

Agent's check.

§ 433. Giving money to an agent to deposit confers no right upon the agent to draw it as agent.

Check of authorized agent may be properly paid, though it is an overdraft, going beyond the limit given by the drawer to the bank.

Revocation of agent's authority.

Married woman's checks.

§ 434. A bank may always treat a woman as though she were a *feme sole* until notified to the contrary, and in some jurisdictions afterward.

§ 435. Joint deposit.

Check requires signature of all.

§ 435. Joint and several.

The order of any one is good.

§ 436. Co-trustees.

All must sign, but in some cases equity will give one authority.

§ 437. Assignees.

Same rule as co-trustees.

§ 438. Co-executors and co-administrators.

Signature of any one is sufficient.

Pennsylvania *contra*.

§ 439. Firm checks.

The bank must pay checks in partnership name, drawn by one partner, and not post-dated.

But must not pay him funds on a check signed in the name of one partner only.

(*a*) Nor is it in fault for refusing the check of one not known to it as a partner.

(*b*) If funds standing to individual credit are paid on a firm check, the bank will absolve itself if it can show that the funds were really partnership property.

(*c*) Form of signature.

(*d*) Surviving partner may draw the firm funds on a firm check, or on his individual check as survivor.

(*e*) Dissolution of the firm.

§ 440. Corporation Checks.

An agreement or mode of dealing may determine the manner in which checks should be drawn, and

The bank is held to a knowledge of what it can learn from the corporate articles and organic law as a whole, but it is not bound to inquire if persons signing as directors have been duly appointed. Internal irregularities in the corporation cannot affect the bank; it may presume that acts are rightly done when they purport to be done in the manner required by the organic law.

(*a*) Treasurer usually can check.

(*b*) If the bank pays on the signature furnished to it as the proper one by the proper authorities, and it has no knowledge, actual or constructive, that the signature furnished is not the correct one, it will be protected in paying on checks signed according to the furnished form.

(*c*) The check should purport to be a corporation check.

§ 440 A. Successors in office command the deposit that was under the official control of their predecessors.

(2) Suspicious Circumstances.

(*a*) Staleness.

§§ 441–443. When a check becomes so old as to put a taker or a bank paying it upon inquiry, and make them subject to equities between prior parties, as, for example, when the check has been paid by the drawer, but left outstanding, or has been lost, &c., is a difficult question, upon which very conflicting answers are given. Usage has not yet crystallized.

§ 444. (*b*) Uncertainty.

Disagreement, omission, or erasure on the check may call for inquiry.

The bank is justified in paying according to the clear intent of the drawer.

The written sum controls figures.

§ 445. Time for inquiry should be taken by the bank in any case that is not clear.

§ 446. (3) Insufficient Funds.
The bank is under no obligation to make a partial payment on a check, unless the holder is willing to deliver the check to the bank as its voucher.
But whether it is bound to pay if the holder is willing to give up the check is a question.
Justice would be best subserved by holding that the bank should pay in such case, for the holder has a right to the deposit, so far as it will go to satisfy the check, just as the depositor himself would have if he stood at the counter with a check drawn in his own name.
It has been held that, if the holder offers to deposit enough to make up the deficiency of funds, the bank must pay, and indorse the amount on the check.
(4) Legal Tender.
§ 447. Payment must be made in legal tender, unless the right is waived. Foreign coin is not sufficient, if objected to.
§ 448. It must be made in good money, for a payment in counterfeit coin or forged notes is no payment, and it is not necessary to take the objection at the time of the payment.
§ 449. But other payments made and received in good faith cannot be
B. Recalled.
§ 449. Otherwise, if the bank suspects the bills it pays are depreciated or worthless, or if the holder knows the drawer has no funds.
But payments made through the
Clearing-House
Can be recovered, if the insufficiency of funds is discovered so as to return the check within the hour set.
C. Order of Payment.
The rule is, First come, first served.
§ 450. (*a*) If a check is refused for insufficiency of funds, and afterward a smaller check is presented, for which the funds are sufficient, the bank can be in no fault in paying this. The only place where fault can be is in refusing the first check. If that was right, paying the second is right. If that was wrong, paying the second is not the wrong, for that was already done at the refusal. § 446.
(*b*) If several checks are presented at once, making a total too large for the funds, the first in date should be paid first.
New York *contra*, holding that the bank is under no obligation to pay any.
§ 451. D. Payment by giving Credit or Certifying.
§ 452. E. Payment after the Bank is Insolvent,
If this is not known to payee or depositor, and is made in the regular course of business, is good.
§ 453. F. The Duty of the Bank is confined to Payment at once.
G. Payment by Mistake.
§ 454. Money paid by mistake of fact may be recovered, (but not if the mistake is of law,) except

If the bank is negligent, and correction would cause loss to a party not equally negligent, the bank cannot recover.
§ 455. A mere mistake as to funds will not base a claim for recovery from the holder. The bank must look to the drawer, except under the clearing-house rules, and even then only the excess of payment beyond the funds on hand can be recovered.
§ 454. If the mistake is fraudulently concealed, the Statute of Limitations does not run. (Mass.)
§ 454. There is no presumption of mistake.
§ 456. The bank must follow precisely the direction of the drawer. Payment before date of check is at the bank's risk.
§ 457. So also in case of payment to the wrong person, though this is questionable where the bank uses due diligence, according to all the means of identification given by the drawer.
(a) Payment of order by telegraph.
§ 440 B. If the bank can show that the funds really went to their proper destination, though improperly paid, the bank is discharged.
§ 440 B. So, if the payment has been ratified by the person entitled to
§ 477. object to it.
H. The Drawer may sue the Bank for Dishonoring his Check.
§ 458. Measure of damages.
I. Defences.
§ 459. Insufficient funds, or not enough available, as if funds, though in bank, have so recently been deposited as not to have been communicated to the proper clerk in the ordinary routine.
Lien.
Revocation, &c., or any link that is lacking in the statement of § 310 or § 430, to complete the duty of the bank, will be a defence.
§ 460. J. Possession of Paid Checks by the bank is as agent of the drawer, unless they are overdrafts; then the bank may retain them adversely until its claim is settled.
§ 460 A. K. Payment of Checks on other Banks.

§ 431. **Presentment must be in Banking Hours.** — A banker is not bound to pay a check presented after banking hours. But if a check is presented after banking hours, and an officer of the bank undertakes to make any answer to the payee concerning it, it has been said, though it probably would not be reiterated in the United States, that he ought to tell him that it may be paid on presentment the next morning, provided of course the condition of the drawer's account at the time of making the statement warrants it.[1] This remark is

[1] § 431. Whitaker *v.* Bank of England, 6 Carr. & P. 700; 1 Cromp. M. & R. 744.

contained in the English cases only, and it is the custom in London that a check presented after banking hours shall be marked, if the depositor has funds, and shall have precedence of others at the clearing-house next day.

§ 432. **Upon whose Checks the Bank shall Pay.** — The indebtedness of the bank upon a deposit is discharged *pro tanto* by its payments made upon any order, check, or draft signed by any person who would have the power to demand and receive the deposit, regarded as a simple debt, and to give full and sufficient acquittance for it.

Signature. — The theory of the law furnishes no sound reason for excepting checks from the general rule that where one executes an instrument simply "A. B., Trustee," or "A. B., Executor," or the like, the appended words, if not explained by the context, must be construed simply as words of description. In order to make it clear in what character or capacity A. B. is acting, he should *state under what trust he is trustee* or of *whose estate he is executor*. Accordingly, it has been held that where a check was signed "R. K. B., Agent," it was the check of R. K. B., and that he was personally liable in case of its dishonor.[1] But where the words "Ætna Mills" were printed on the margin of a check, which was signed "I. D. F., Treasurer," the court said that the fact of the agency was sufficiently apparent on the face of the instrument, that the check was that of the company, and that I. D. F. could not be held personally liable upon it.[2] These decisions, however, bear upon the liability of the drawer of the check, and not upon the duty or obligation of the bank, which is probably restricted to requiring a signature which shall correspond with the terms of the deposit account. If A. B. deposits money to the account of "A. B., Trustee," or of "A. B., Executor," the bank is not bound to inquire or to take notice of any fact as being intimated by these additional words. He deposits as "A. B.,

The bank should require the signature to be identical with the credit on its books.

[1] § 432. Bickford *v.* First National Bank of Chicago, 42 Ill. 238.

[2] Carpenter *v.* Farnsworth, 106 Mass. 561, citing a number of cases decided in the same State concerning the general point of the disclosure of agency in the execution of an instrument.

Trustee"; he may draw out as "A. B., Trustee." He might deposit in a fictitious name, or under a firm or corporate style, as convenience or a whim should induce him. The bank is absolved if the signature is that of the person making the deposit, and if it accords precisely with the name, description, or style to the credit of which that person chose to place the money. Hence, if the depositor instituted the account in his name as "Trustee for C. D.," it is possible, and would follow from a rigid application of the strict rule of the law, that a check paid from that account upon his signature simply as "Trustee" might not be regarded as a good payment, if the money did not really come to the use of the trust estate. The proper and only safe rule for the bank to adopt is to require the signature to be identical in terms with the credit on the books.[3]

§ 433. **Agent's Checks.** — A bank may of course pay checks drawn by a duly authorized agent, but merely giving money to an agent (A.) to deposit does not confer any authority upon the agent to withdraw the money (§ 314); and if the bank has notice that the funds are not the property of A., it will be liable to the principal for paying without his order.

But if checks are drawn by an agent duly authorized, the bank may pay them and charge the principal, although the latter has notified the bank not to allow an overdraft beyond a certain limit which the said check transcends.

A bank must not pay on an agent's check drawn after notice from the principal revoking agent's authority;[1] but if a check has been already drawn, the burden of proof is on the principal to show that the holder to whom the bank paid the check was not a holder for value.[2]

Where an agent drew a post-dated check, signing it as agent, but without indicating his principal, the latter was held not liable to a transferee before date.[3]

§ 434. **Married Woman's Checks.** — In the absence of circumstances charging it with knowledge that a woman is

[3] See Tryon *v.* Oxley, 3 G. Greene (Iowa), 289.

[1] § 433. Farmers', &c. Bank *v.* King, 57 Pa. 202.

[2] Philadelphia Bank *v.* Frankish, 91 Pa. 339.

[3] Anderton *v.* Shoup, 17 Ohio St. 125.

married, a bank may open an account with her and pay her checks as if she were a *feme sole;* and if it turns out that she was really married, and the money was her husband's, the latter, who put the confidence in her and enabled her to commit the fraud, must bear the loss.[1] And it has been further held, that, even though a bank may know the woman is married, it may lawfully receive deposits from her and pay her check.[2]

Bank may treat a woman as *feme sole* until notified to the contrary, and even after notice in some jurisdictions.

The whole matter of the rights of a married woman depends so much upon the statutes of the various States, that reference must be had to them and to the decisions under them in the particular jurisdiction in which the question may arise.[3]

§ 435. **Joint and Joint and Several Deposits.** — If several persons, not being partners, make a deposit to their joint credit, the bank ought, strictly speaking, to have the signatures of all of them appended to a check before paying it.[1] But if the deposit be made to their joint and several credit, then the order of any one of them may be honored. Mr. Grant *loco citato* intimates that, in case of a payment made from a joint account solely, upon the order of less than all the depositors, the amount paid could not be recovered by the bank from the actual signers, on the ground that the proceeding on the part of the bank would, under the circumstances, be simply a gratuitous payment.

Where three persons drew a check directing the bank to pay "selves or bearer," and each one of them signed the check in his own single and individual name, and the check was put aside and kept as collateral security, it was held that it was

[1] § 434. Dacy *v.* New York Chemical Manuf. Co., 2 Hall, 550.

[2] German Bank *v.* Himstedt, 42 Ark. 64; 46 id. 537.

[3] Wilderman *v.* Rogers, 7 Eastern Rep. 786.

[1] § 435. See Grant on Bankers and Banking, pp. 32, 33; Innes *v.* Stephenson, 1 M. & Rob. 145; Stone *v.* Marsh, Ry. & M. 364; Brandon *v.* Scott, 7 El. & Bl. 234, 237; 26 L. J. Q. B. 163; Wallace *v.* Kelsall, 7 M. & W. 242; Husband *v.* Davis, 10 C. B. 640; Dixon's Case, 2 Lewin Cr. Cas. 178; Sloman *v.* Bank of England, 14 Sim. 459; 9 Jur. 243.

the joint, and not the joint and several debt of the signers, so that an action would not lie against one of them for the whole amount of the note.[2]

§ 436. **Trustees.** — If the deposit is placed to the credit of divers persons, as *trustees*, the signature of all is indispensable to the validity of the check.

But in one case in England, where the trust fund was small, and there were five trustees, who were scattered widely asunder throughout the kingdom, the Court of Chancery interfered, to save expense, and made an order that payment should be made to them "or any of them."[1] Grant, in citing the case,[2] seems half inclined to question the propriety of the decision; and declares that, at any rate, it would seem that the fund must have been previously under the control of the court, as happened to be the fact in the particular case.

§ 437. **Assignees.** — In England, the inclination has been to extend the same principle, by analogy, to assignees of an estate in bankruptcy. Grant considers it as still doubtful whether the signature of one assignee would suffice to discharge the bank.[1] In Can *v.* Read,[2] the Lord Chancellor said that he doubted whether the receipt of one assignee given in return for a payment made to him singly would discharge the debtor; that the discharge could not be absolute unless a receipt were also obtained from the co-assignee. The ruling was based on the principle that assignees in bankruptcy are a sort of trustees. Equity, however, will also exert the same control over the fund in the hands of the assignees when one of them absconds, which we have seen that it would exert, on other sufficient cause, over an ordinary trust fund. So, where one of three co-assignees absconded, the two remaining assignees petitioned the Court of Chancery that the bank should be ordered to pay upon checks signed only by them, and the Lord Chancellor made the or-

Equity will relieve if one assignee absconds.

[2] Other *v.* Iveson, 24 L. J. Ch. 654; 3 Drew. 177.

[1] § 436. Shortbridge's Case, 12 Ves. Jr. 28.

[2] Grant on Bankers and Banking, p. 30.

[1] § 437. Grant on Bankers and Banking, p. 28.

[2] 3 Atk. 695.

der as requested.[3] So long as our Bankruptcy Act remained in force, the question was not one which could ever arise in this country. For the act expressly directed how the deposits and drafts of the assignees should be made and signed, and no check could be properly paid by the bank unless it had not only been signed according to the law by both assignees, but had also been countersigned by the register in bankruptcy.[4]

§ 438. **Co-executors.** — As the ordinary rule in regard to executors and administrators is precisely the converse of that concerning trustees, and as the signature of one executor is sufficient to discharge a simple contract debtor, so the signature of one of several who are co-executors or co-administrators *de facto*, to a check, is sufficient authority to the bank to pay it.[1]

But the following case would seem to be of a contrary purport. Two co-executors opened their joint account as such with certain bankers. The bankers afterward failed, and their composition paper and discharge was signed by one of the executors on behalf of the estate. Subsequently, in suit against the bankers, it was held that this was not a valid acquittance. The court said: "It were futile to open a joint account, if one of the depositors could withdraw the money. All must, therefore, unite in the receipt or check, in order to discharge the banker; and it follows that he cannot rely on a compromise or release by one as a defence. This is not so much an exception to the rule, that a payment to a co-executor discharges the debt, as a return to the general rule to which that is an exception." [2]

§ 439. **Firm Checks.** — Ordinarily every firm or partnership has its firm name or style in which the checks drawn by it

[3] Ex parte Hunter, 2 Rose, 363; 1 Meriv. 408; stated to be decided on the authority of Ex parte Collins, 2 Cox, 427.

[4] Rule XXVIII., supplementary to the Act to establish a Uniform System of Bankruptcy, approved March 2, 1867.

[1] § 438. Ex parte Rigby, 19 Ves. Jr. 463; Can *v.* Read, 3 Atk. 695; Allen *v.* Dundas, 3 T. R. 125; Pond *v.* Underwood, 2 Ld. Raym. 1210; Prosser *v.* Wagner, 1 C. B. N. S. 289; Gaunt *v.* Taylor, 2 Hare, 413.

[2] De Haven *v.* Williams, 80 Pa. St. 480.

are signed, either by any one of the partners or by any attorney sufficiently empowered thereto by the partnership. The bank must pay checks not post-dated, and drawn in the partnership name.[1] But a bank must not pay partnership funds on a check signed by a partner in his own name instead of the firm name.[2]

As a bank is bound to know its customers' handwriting, so it is bound to know the handwriting of the various members of the partnership; for the combination of all their handwritings may be said to constitute the handwriting of the firm which is the customer. Each of them is entitled to draw a check, and to sign it with the firm name, and the bank is bound to recognize and honor the instrument; though, of course, the firm could not prevail in a suit brought to recover damages from the bank for its failure to honor a check signed by a partner whose signature had never been furnished to the bank. In like manner, it is bound to honor checks signed with the firm name by an agent or attorney duly empowered so to sign.

(*a*) Grant lays down that the bank is not bound to pay a check signed by one who is not known to it to be a member of the copartnership; as, for example, by one who is a dormant partner.[3] But in a judicial decision, recognizing the correctness of this rule, it was also added, that if there was any evidence, however slight, going to show that the bank ought to have known the fact of the signer's partnership, then the question was made for the jury, whether or not the bank ought to have known this. If the question were answered in the affirmative, the bank would be held to all the consequences of actual knowledge; if in the negative, then the bank would be acquitted for its nonpayment.[4]

Bank not obliged to pay check of one it did not know was a partner.

[1] § 439. Forster *v.* Mackreth, L. R. 2 Ex. 163; Kirk *v.* Blurton, 9 Mees. & Wels. 284; Emly *v.* Lye, 15 East, 7; Nicholson *v.* Ricketts, 29 L. J. Q. B. 55.

[2] Coote *v.* Bank, 3 Cranch C. C. 50.

[3] Grant on Bankers and Banking, p. 33.

[4] Cooke *v.* Seeley, 2 Exch. 749.

(*b*) On the other hand, it is allowable for the bank to show that a deposit or credit standing in the name of an individual partner was really partnership property, and in fact a partnership credit. By proof of this it will be absolved if it has paid partnership checks out of these funds. But its proof must be very thorough and satisfactory. Simple evidence that the money deposited was at the time partnership property does not go far enough; but must be supplemented apparently by evidence that it was also really *paid in* on partnership account, and was designed to constitute, or at least ought rightfully to have been designed to constitute, a fund available for partnership uses, and for the honoring of partnership checks.[5]

Bank may show that individual deposit was really firm's.

But the mere fact of the existence of a trade partnership does not raise an implication of law that a single partner is authorized to bind the firm by opening a bank account on its behalf, but in his own individual name.[6]

Doubtless, also, unless the checks were signed, as is customary, simply with the firm name, the fact might be properly regarded as so extraordinary and suspicious that the bank would be protected if in good faith it should refuse payment on them until it could have time for inquiry. At the same time, it is surprising to see in what a number of cases persons do not seem to have been content simply to sign the firm name, but have discovered the greatest number of ingenious methods of evading a duty apparently so very simple and unobjectionable. Two or three of these cases may possess sufficient interest or value to justify a brief summary of them. They are all English.

(*c*) A check signed "A. & Co. per procuration of A." is a good check to bind the firm, and may accordingly be paid by the bank from the funds standing to the credit of the firm.[7]

Forms of signature.

A check was signed by one partner only; but he distinctly stated himself to be signing also on behalf of all the rest,

[5] Sims *v.* Bond, 5 Barn. & Ad. 389.

[6] Alliance Bank *v.* Kearsley, 6 L. R. C. P. 433; 40 L. J. C. P. 249.

[7] Williamson *v.* Johnson, 1 Barn. & Cr. 149.

thus: "For A., B., C., and D. — C." It was held that the obligation bound the partnership, inasmuch as C. had authority to execute such an obligation in the name of the partnership; also that C. could not be individually held upon it.[8]

Whether or not a partner could sufficiently bind the firm by signing the individual names of the several partners respectively, instead of simply signing the firm name, is a question which is perhaps not fully settled. The inclination is to answer it in the affirmative. Grant is only willing to put it as a *quære*. But the case which he cites seems to support the validity of this species of signature.[9]

(*d*) On the death of one partner, the survivor may draw checks against the partnership account, either in the firm name or his own, as survivor.[10]

Surviving partner.

(*e*) If the partnership be dissolved, with an understanding or agreement between the partners that one of them, or any other person on their behalf, shall have control of the funds and affairs for the purpose of winding up business, it is essential that the authority conferred upon this individual be clearly exclusive of any residuary or co-ordinate authority still remaining in any of the other partners. This fact should be distinctly stated to the bank. Otherwise it is possible that the bank might still be justified in continuing to pay upon checks signed by any member of the partnership; for a general power to one to settle affairs is not, as a matter of legal necessity, a deprivation as against the rest of all power to act in any matter;[11] neither is it authority to the bank to assume that the other partners have parted with or lost their rights in what has certainly been their own property.

Dissolution of firm.

[8] Ex parte Buckley, 14 M. & W. 469. This case overrules the previous case of Hall *v.* Smith, reported in 1 Barn. & Cr. 407; 2 D. & R. 584; which was to a contrary effect. The opinions were given by Barons Parke, Alderson, and Platt.

[9] Grant on Bankers and Banking, p. 32; Norton *v.* Seymour, 3 C. B. 792.

[10] Backhouse *v.* Charlton, 8 Ch. D. 444 (1878).

[11] Porter *v.* Taylor, 6 Mau. & Sel. 156.

If two distinct firms unite in their capacities as such to form a third firm, payment upon the check of either of the component firms is valid.[12]

§ 440. **Corporation Checks.** — Where a corporation opens a deposit account with a bank, it is ordinary prudence for the bank to satisfy itself upon the matter of who are the officers competent under the charter or the by-laws to draw checks. If it makes payments upon checks signed by officers among whose legal functions the right of signature does not appear, then it runs a very serious risk of being still held responsible to the corporation for the amount thus irregularly paid away. It may find means to protect itself by showing an implied authority in the officer so to sign; or a subsequent ratification by the company of the particular act of signing; or by proof that the money was actually spent in the due and necessary course of the corporate affairs. But these are slender reeds on which to rely. Even if these facts exist, it will probably be difficult, and perhaps impossible, for the bank to gather competent evidence of them. The *prima facie* case is against the bank if it pays on a check irregularly or improperly signed; and as formalities are often of vital importance in corporate affairs, a bank cannot neglect to demand strict compliance with them without incurring serious danger of loss.

Through the corporate articles the bank is held to a knowledge of the duties of directors, and the mode of appointment, and the manner in which under said articles money may be drawn, and it should exercise due care to know if the company is a going concern, or has stopped, parted with its assets, &c. But if the bank pays checks signed by three directors of the company, according to the form sent to it by these directors for its guidance, it is not obliged to inquire whether the directors have been *duly appointed* according to the articles of association.

The bank is not affected by irregularities in the internal management of the company; it is *entitled to presume that*

[12] Duff *v.* East India Co., 15 Ves. Jr. 198; Collyer on Partnership, p. 455.

external acts are rightly done when they purport to be done in the manner in which they should be.[1]

(*a*) The power of signing checks may be conferred in a considerable variety of ways. Thus, in many States, general laws governing corporations may prescribe the rule; otherwise, the charter of the particular corporation may prescribe it, perhaps in contravention of such laws. It may be left to be declared in by-laws. And in the absence of regulation by any of these methods, it may be settled by custom, course of dealing, and the implied power arising from these sources. Ordinarily, it is assumed, in the absence of specific regulation, that the treasurer has control of the funds of the company. Yet it is by no means certain that this general assumption would alone afford a safe and sufficient basis to justify the bank in paying money on a treasurer's check. The technical theory is, that a check is like an acquittance, discharge, or receipt, given for an ordinary money debt. But it by no means follows that this rule can be applied as a universal touchstone, with the view of holding that a payment may be safely made on a check signed by any person who can receipt for payments made to the corporation. For it may well be that the corporation may have created an agent whose function is or includes the right to make collections and give receipts, without any right whatsoever to sign checks. Further, if the power to draw checks is conferred by statute or charter upon any designated officer, it may be that it is not conferred exclusively. The positive affirmance of the law, that one shall be able to draw checks, may not in all cases preclude the corporation from conferring expressly or by implication the same power upon other officers also. This will depend upon the language of the law of the corporate existence. The old English rule of law, requiring all documents in the nature of contracts to be executed under the corporate seal, has been so long forgotten and disused in respect to such common instruments of daily

Treasurer usually can check.

[1] § 440. Mahony *v.* East Holyford Mining Co., 33 Law T. 383–386; Fountaine *v.* Carmarthen Railroad Co., L. R. 5 Eq. 316; Ernst *v.* Nicholls, 6 H. L. Cas. 401.

use as checks and receipts, and the like, that it has almost sunk out of memory.[2]

(*b*) Upon the whole, no rule can be laid down under which a bank can be sure of protecting itself, except that it shall always inform itself by sufficient inquiry who may sign, and in what form they are to sign. For though ordinarily the general fiscal officer will have control of the bank deposit, yet this is not necessarily or always the case. Especially frequent is the habit of requiring his checks to be countersigned by some other of the corporate agents. How far a bank would be affected by a knowledge of such a regulation, which had not been especially brought to its notice, is still an open question. If the rule were only in the by-laws, it might be regarded as incumbent on the corporation to notify the bank, rather than on the bank to inquire of the corporation. But if the law of the corporate existence were a public law, the courts would, as we have seen, demand knowledge of it on the part of the bank officers, as a part of their own duties. If the person whose signature is furnished to the bank at the time of the deposit as that of the party authorized to draw checks thereafter does draw them, the bank will be protected in its payments upon them, even though properly he was not empowered to draw.[3]

Signature furnished the bank.

But this rule, it seems to us, must be taken with the qualifications, 1st, that the signature be furnished by the proper authority, or such persons as the bank has a right to regard as proper authorities, i. e. either the directors *de jure* or *de facto*, or some person having actual, or as to the bank implied, authority to furnish the signature; and, 2d, that the signature furnished shall not be a wrong one within the actual knowledge of the bank, or within such knowledge as it is bound to have from the articles of association and organic law in general.

In the cited case the moneys of the company were sent by some person to the bank at the opening of the account, and were credited to the company. The president was in the

[2] Serrell *v.* Derbyshire Railroad Co., 9 C. B. 811; 19 L. J. C. P. 377.

[3] Fulton Bank *v.* New York & Sharon Canal Co., 4 Paige, 127.

bank when the money came in, and left his signature with the bank as the one on which the money should be drawn. The court said that the directors did not in fact intend to give the president any such power, nor had he such power *ex officio*. The bank officers had no right to presume from Brown's position that he had a right to check out the corporate funds. But there was proved a custom of the New York banks, upon opening an account, whether by corporate or other person, for the one making the deposit, or who was to draw the money, to leave his signature on the signature-book, and that all payments were made on that signature; and as the company was negligent in not sending a deposit ticket or requiring a certificate of deposit in the company's name, the deposit must be considered as made by the president, or under his direction, and the loss must be considered that of the company. The case is very unsatisfactory. The bank credited the amount to the company, and not to the president, and the bank knew that the president had no authority, by virtue of his office, to draw the money, and his authority surely cannot be determined by his own representations.

Suppose the porter had brought the money, telling the bank it was company money, and left his name as the signature on which the money should be paid. Would the bank have been justified in paying? It seems clearly, No. Yet the cases differ in no essential.

The case cited by the court in this Fulton Bank decision to support the above idea, is entirely aside. A husband gave his wife money to deposit for him. She deposited in *her own name*, leaving her signature as the one upon which the money should be drawn, and the bank had no notice that the money was not hers, nor even that she was married.[4] Here the bank knew the money was not that of the president.

In England, the deed of settlement, as they style the corporate charter, often specifically requires all corporate checks to be signed by three directors.

[4] Dacy *v.* New York Chemical Manufacturing Co., 2 Hall's Super. Ct. R. 550.

(*c*) In whatever form the check may be drawn, it would seem at least that it should be clearly signified, by some words upon its face, that it is designed to be and is the check of the corporation. It is by no means necessary that the signature should be that of the corporate name; but the corporate nature of the act must be clearly apparent. In the case of Serrell *v.* Derbyshire Railroad Company,[5] where the signature of three directors was required, a check was introduced which was signed by three persons, who were as matter of fact directors, but who did not so style themselves on the face of the check. Neither was there upon it any further reference to the corporation than was comprised in the impression of a stamp, which bore the corporate name and a date. It was decided that the check did not sufficiently purport to be the check of the company, and would not bind the company, even in the hands of a *bona fide* holder for value.[6] It is an unavoidable corollary from this, that the bank having the corporate funds on deposit would not have been protected in paying this check, and could not have had credit for the amount in its account with the corporation, had the money been misapplied. But how far in such a case it would avail the bank to show that, in the usual course of its previous dealing with the corporation, checks drawn in this form had always been cashed without question, no authorities enable us to say. Grant puts it as a *quære*, but apparently inclines to think that evidence to this effect might materially benefit the bank, provided the transaction were in no part tainted with any approach to bad faith.[7] But the authorities[8] which he cites must be acknowledged not to be very conclusive or satisfactory.

See Signature, above, § 365.

If a bank can show that the money paid out on checks

[5] 9 C. B. 811; 19 L. J. C. P. 377.

[6] But see Bickford *v.* First National Bank of Chicago, 42 Ill. 238; Carpenter *v.* Farnsworth, 106 Mass. 561.

[7] Grant on Bankers and Banking, p. 35.

[8] Barber *v.* Gingell, 3 Esp. 60, which holds that the fact that one has habitually paid forged bills may be shown, as constituting an adoption by him of a similar bill, against which he seeks to set up the forgery. Levy *v.* Pyne, Car. & M. 453; Bult *v.* Morrell, 12 Ad. & El. 745.

signed by directors, but not *as* directors or not in proper form, really went to the corporation, it can charge the same to the company.[9]

§ 440 A. **Successors in Office.** — When money is officially deposited by an officer or a board of officers, their successors command the deposit.[1]

§ 440 B. **Substance cures Form.** — If no substantial injustice results, the bank is not liable, though a payment has been made upon an order not in proper form. For example, if in any case a check has been paid by the bank upon an insufficient signature, yet there is authority to support the doctrine that, if the bank can show that the money so paid was actually applied in good faith, and according to the requirements of law, in the due course of the execution of the trust or administration or bankruptcy proceedings, or of the business of the corporation or partnership, from the funds of which it was paid, then the bank, in the absence of any fraud in the transaction, may be held acquitted by the payment. If the *cestuis que trustent* have really received the sums due to them under the trust; if the heirs at law and legatees of one deceased and the creditors of a bankrupt have in fact received all the moneys to which the amount of the estate entitled them; if the corporators and copartners have really enjoyed the benefit of the money taken from the bank through its application in the necessary course of the conduct of their affairs, — there is no reason why they should be extraneously enriched from money obtained by muleting the bank in a second disbursement of a sum which it has once paid, though without a due regard to legal formalities. Provided the sum was honestly paid by the bank, was honestly applied, and has reached its proper destination, doubtless the bank is absolved. It may not be a very valuable method of defence for the bank, which is not likely often to have the means of tracing the money, and affording satisfactory legal proof of its use after the payment; but such

In case of payment on wrong signature, bank released if the funds really went to the proper destination.

[9] In re Norwich Yarn Co., 22 Beav. 143.

[1] § 440 A. Lewis *v.* Park Bank, 42 N. Y. 463; Carman *v.* Franklin Bank, 61 Md. 467; Tay *v.* Concord Savings Bank, 60 N. H. 277.

as the privilege may be, it is one which enures to the bank for whatever it may in any case be worth.[1]

So if any payment has been ratified by a person who could have objected, such person can thereafter hold the bank to no liability on that account. As where a deposit was made in a savings bank to the credit of "Olive J., David, Agt.," evidence that at the times of entry of balances the book was in possession sometimes of Olive and sometimes of David, and that part of the money drawn out by David was used in Olive's business, was held to establish a ratification by Olive of the payment to David.[2] Ratification.

§ 441. **Cases in which Checks have been held Stale.** — A draft was drawn October 15, 1881, indorsed the same day to E., who held it (there is no explanation of the reason) until March 8, 1882, when he indorsed it to J. Held that the lapse of four months and twenty-three days after issuance made the draft overdue.[1]

Where a person took a check two and one half years old, and having the abreviation "mem." written on its face, it was held that these facts were sufficient to put him upon his inquiry, and that in default of inquiry the check in his hands was subject to such equitable defences as the drawer could maintain against the payee.[2] Mem. check two years old stale.

In a case where the payee of a check lost it, and the finder, five days after the date of the check, tendered it to a shopkeeper in payment for goods, and the shopkeeper received it and gave change for it, and then ob- Five days stale.

[1] § 440 B. In re Norwich Yarn Co., 22 Beav. 143. The deed of settlement required a check to be signed by three directors. The court said that, though money had been had by the directors on a check not so signed, yet it should be allowed to them in passing their accounts *if it had been bona fide applied to the purposes of the company.* Can *v.* Read, 3 Atk. 695; *quære*, whether payment to one of several assignees of a bankrupt estate, *unless he brought the sum to account*, would discharge the debtor.

[2] Wilcox *v.* Onondaga County Savings Bank, 40 Hun, 297.

[1] § 441. La Due *v.* First National Bank of Kasson, 31 Minn. 33 (1883).

[2] Skillman *v.* Titus, 3 Vroom, 96.

tained its amount from the banker on whom it was drawn, the payee was allowed to recover the amount from the shopkeeper in an action for money had and received; the court holding that the person who tendered the check had no title, and could transfer none, the check being overdue at the time of the tender.[3]

Since then, however, in a closely similar case, where the check was taken six days after its date, the court held that no such flaw could be imported into the title by reason of the age of the check; for that the rule, which could not be questioned as to bills of exchange and promissory notes, did not obtain concerning checks.[4]

§ 442. **Checks held not Stale.** — It has been held that a person receiving a check several days after it is drawn (ten days in this particular case) receives it without being subject to any equities or defences, as between the drawer and the payee or any previous holder, of which he had no notice at the time when, or before, his title accrued.[1]

To like effect was the decision given in the case of a check which, in the hands of the payee, might have been avoided as in contravention of the Bankrupt Act, but which an innocent indorsee for value, receiving it fourteen months after its date, was allowed to enforce against the drawer.[2]

A holder who takes a check six, or seven, or ten days after date, is not subject to equities between prior parties, of which he had no notice.[3]

A check given on Saturday is not to be considered stale on Monday, for the purpose of affecting the party who takes it

[3] Down *v.* Halling, 4 Barn. & Cr. 330.

[4] Rothschilds *v.* Corney, 9 Barn. & Cr. 389, 391; see Ames *v.* Meriam, 98 Mass. 294.

[1] § 442. Ames *v.* Meriam, 98 Mass. 294; so Rothschilds *v.* Corney, 9 Barn. & Cr. 389, 391, where the time was six days; and see Lancaster Bank *v.* Woodward, 18 Pa. St. 357; Serrell *v.* Derbyshire Railroad Co., 9 C. B. 811; Poorman *v.* Mills, 39 Cal. 345; but see, *contra*, the earlier case of Down *v.* Halling, 4 id. 330.

[2] Cowing *v.* Altman, 71 N. Y. 435; 79 N. Y. 167; see 1 Th. & C. 494.

[3] Ames *v.* Meriam, 98 Mass. 296, First National Bank *v.* Harris, 108 Mass. 514; Stewart *v.* Smith, 17 Ohio St. 82.

on Monday with the infirmities affecting the title of the party from whom he receives it.[4]

Some authorities, however, in discussing when the taker of an old check could be held to take it, like other stale or overdue paper, subject to the same equities to which it is liable in the hands of the transferrer, go so far as to say that the check is never, until outlawed by lapse of time, to be considered as overdue for the purpose of bringing it within the operation of this rule of law. They say that in fact a check is not really due until it is demanded; therefore it is not overdue until it has been presented and dishonored.[5]

Bayley, in his work on Bills, would have the same rule as to equities apply to checks which applies to bills and notes.[6] But Mr. Grant seems to put it better. He says: "There is an obvious distinction between a bill or a note having a fixed day for payment, which is taken when overdue, and a check found in circulation long after its date: in the first case, suspicion of necessity attaches; in the latter, suspicion may or may not justly arise, according to circumstances; whether it does, is for the jury to say; the staleness of the check may be a ground on which they may infer fraud; but there does not seem to be any rule of law which points out any given degree of staleness, as evidence conclusive on that point."[7] The question is (as stated in Kent's Comm., *loc. cit.*), whether the taker of the overdue check "exercised a reasonable caution in taking it," and this is of course a question of fact for the jury.

Chief Justice Savage had previously said: "I apprehend that greater diligence has been required in presenting checks than ever has been required in presenting bills of exchange."[8]

[4] Clark *v.* Stackhouse, 2 Mart. (La.) 319, at p. 327.

[5] Story on Promissory Notes, Sharswood's ed., pp. 678, 679; Cruger *v.* Armstrong, 3 Johns. Cas. 5; Barough *v.* White, 4 Barn. & Cr. 325; Rothschilds *v.* Corney, 9 Barn. & Cr. 389.

[6] Chap. V. § 3.

[7] On Bankers and Banking, 3d ed., p. 71; to the same purport, see 3 Kent's Comm. 91, n. *b*; Mohawk Bank *v.* Broderick, 13 Wend. 133.

[8] Mohawk Bank *v.* Broderick, 10 Wend. 304; to the same purport is also Gough *v.* Staats, 13 id. 549.

§ 443. **Age of Check as affecting Bank's Duty.** — The duty of the bank to honor a check is not affected by its age, at least within the period of the Statute of Limitations. The check is a continuing order, good at any time before outlawry or revocation; and the bank, having sufficient funds of the drawer, is under the obligation to pay it, and is protected in paying it, at any time within these limitations.[1] The only effect of age is to put the bank upon its inquiry. Age may be a cause of suspicion, but not of avoidance. It is the right, and perhaps the duty, of the bank to inquire into the matter before paying an old check. Grant declares this to be a sound and ordinary rule of business. Yet at what time a check becomes "old" is an indefinite question, not capable of being accurately answered. Certainly it is not so old as to put the bank upon inquiry simply because it has not been presented within the period heretofore declared to be proper as between drawer and payee. The rules governing presentment, as between drawer and payee, do not have any close application as between drawer and drawee, or as between payee and drawee. If, however, the bank chooses to waive its privilege of inquiry and pay the check, it may do so. If the check be good, the bank will suffer no loss. But if the check ought not to have been paid, and the bank, by inquiring, would have discovered the fact, then the bank may be held to bear the loss arising from its own laches. The question of whether or not there was culpable laches will be for the jury. So would also be the question whether or not the bank had insisted upon inquiry without sufficient cause, arising in an action by the depositor against the bank for damages for not honoring his check.[2]

Bank's negligence in not making inquiry, question for jury.

We will take leave of this topic with the statement of the Pennsylvania case of the Lancaster Bank *v.* Wood-

[1] § 443. Deters *v.* Harriot, 1 Show. 164; Brown *v.* Davies, 3 T. R. 80; Sturtevant *v.* Foord, 4 Scott, N. R. 668; Rothschilds *v.* Corney, 9 Barn. & Cr. 388; Willetts *v.* Phœnix Bank, 2 Duer, 121.

[2] Boehm *v.* Stirling, 7 T. R. 423; cited to the same point in Bayley on Bills, Chap. V. § 3; and both cited in Grant on Bankers and Banking, p. 71; Lancaster Bank *v.* Woodward, 18 Pa. St. 357.

ward.[3] It is the most valuable of all which bear upon the matter under discussion. A check was drawn, in which a day certain was named for payment. Neither on that day nor on any subsequent day had the drawer funds in the bank to meet the check. After the lapse of one year from the day named for payment, the check was presented to the bank and demand made. The bank paid it. The drawer, having in the mean time discharged the original debt, and considering, therefore, that the check was no longer good, at least as against him, refused to reimburse the bank, which accordingly brought suit against him. The court said that the authorities differed as to whether the question of what was reasonable time for the presentment of a check should be regarded as a question of law for the court or of fact for the jury. Generally speaking, the latter was probably the better course. But in this case payment of so old a check, under such circumstances of suspicion as the drawer's continued want of any deposit to meet it, must be considered to show a degree of negligence on the part of the bank so great that the court felt itself justified in taking the case from the jury, on the ground that, as matter of law, the bank could not recover. The circumstances were "sufficient to put the bank on inquiry"; its negligence in failing to make inquiry precluded it from relief as against the drawer.[4]

Lapse of a year after day named for payment puts bank on inquiry.

§ 444. **Errors in Writing Checks.** — An error or omission occurring in the writing of a check, which is simply clerical, and so obvious that there can be no question in the mind of a reasonable person as to what was the actual intent of the drawer, may be safely disregarded by the bank. A payment made upon such a check according to its clearly intended tenor will be protected. Of course, in determining what particular defect will be covered by this rule, the officers of the bank can have no guide beyond

Bank is justified in paying according to the intent of the drawer.

[3] 18 Pa. St. 357.

[4] In a case in New York, arising between individuals, parties to the check, it was held that, where the facts were not disputed, the question of whether or not due diligence had been used in presentment was one of law for the court. Bryden *v.* Bryden, 11 Johns. 187.

their own discretion. But the doctrine is designed for their protection, not for the imposition of an extraordinary duty upon them in judging of and correcting their customer's mistakes. If there can be any shade of doubt in their own minds, they are perfectly at liberty to decline to put an interpretation upon the document other than that which its naked phraseology distinctly expresses. It is only where they voluntarily consent to adopt its obvious intent in place of its strict expression, that they will be saved harmless in doing so if the case shall be judged to be a sufficiently clear and certain one to have authorized their action. A fair example of the species of correction which it would be safe for a bank to make is furnished by the check which the court had to construe in the case of Phipps *v.* Tanner.[1] There the words, "twenty-five, seventeen shillings & three pence" were written, and alone designated the sum for which the order was drawn. The omission of the word "pounds" after "twenty-five" was declared to be so clearly accidental, that it might be supplied.

Written sum controls figures.

Where the sum written in the body of the check differs from the sum expressed in figures in the corner or margin, the written words, as being the more deliberate act of the drawer, are presumably correct and will control the figures.[2] This rule received a strong illustration in the cited case of Smith *v.* Smith. The marginal figures differed from the sum written in the body, and were altered by the holder so as to make them conform to the written words, but without the knowledge or consent of the drawer. It was sought to have this transaction declared a forgery, as being an alteration of the instrument in a material part. But the court said that the marginal figures in a bill of exchange served only as an index for convenience of reference, and formed no part of the bill. The bill was not vitiated by an alteration in them which only caused them to conform to the

[1] § 444. 5 Carr. & P. 488. See also the cases discussed and cited in the chapter on "Checks in General," where the mark $, or the word "dollars," had been accidentally omitted in writing the check.

[2] Saunderson *v.* Piper, 5 Bing. New R. 430; Smith *v.* Smith, 1 R. I. 398.

written sum. Nay, where they differ from the body, it is even laid down that evidence is inadmissible to show that the bill was in fact negotiated for their amount, and not for the amount expressed in the written words. No case could well go farther, or be more conclusive of the whole matter, than this.

§ 445. **Qualified Refusal. — Time for Inquiry.** — The position of the bank with regard to the payment of checks must often be a very delicate one. For it is, as it were, placed between two fires. If it refuses to pay a check which it ought to pay, then it is liable in damages to the depositor. If it pays a check which it ought not to pay, in ninety-nine cases out of a hundred the loss will be its own. It is noteworthy, however, that in no case where damages have been awarded to a depositor, or where the rule has been laid down that he should have damages, has it been otherwise held or expressed than that the damages should be given for an absolute, unqualified refusal to pay. Now, it may well be that a refusal to pay, where for any sufficient cause the bank has reason to doubt the regularity of any part of the transaction, only until the bank can assure itself of the real facts, would be considered so far different from an absolute refusal that it would be sanctioned as justifiable and proper. Of course the bank *should reserve funds enough, during the time of its inquiry, to meet the check* if it should prove to be correct. *Of course also it should make the qualified nature of its refusal, and its intent so to withhold funds enough to secure the check, distinctly known* to the holder at the time of his demand. Then there might be left, as a fair question for a jury, whether or not the conduct of the bank was *bona fide,* and the circumstances of suspicion sufficient to justify the delay for inquiry. The finding of these facts in the affirmative ought to absolve the bank from any liability to either holder or drawer, even though neither of these parties wilfully or negligently gave occasion for the suspicious circumstances. For the nature of the banking business is such, that unless the privilege of taking reasonable precautions of this description for the prevention and de-

Bank should be allowed to take time for inquiry, if it reserves funds and makes known that its refusal is qualified.

tection of fraud and irregularity were allowed, prudent men would shrink from the excessive risk, and the business would fall into the hands of adventurers. Upon a strict legal basis, a demand for a brief delay of payment, for inquiry's sake, need not be construed as an absolute refusal to pay, for which alone the authorities as yet give a right of action.[1]

Check torn and pasted together.

It is impossible to conceive of all the various possible occurrences which might suffice to arouse a reasonable suspicion on the part of the bank that the check ought not to be paid. But if such circumstances do exist, and are sufficiently strong to give to the payment by the bank the character of gross negligence upon its part, then the loss resulting from payment is exclusively that of the bank. Where a check had been torn to pieces and pasted together again, and was in this shape presented to the bank and paid by it without inquiry, the laches of the bank was declared to be so excessive that it should bear the loss.[2] Yet, to go back to the argument of the last paragraph, it is evident that, if this tearing to pieces had not been done *animo revocandi*, but accidentally, and in the hands of a *bona fide* holder who had rightfully pasted it again, and the bank had refused payment until after inquiry could be had, this dilemma would have arisen: either, on the one hand, that the bank would not be liable in damages to the depositor, though it declined to pay on demand his *bona fide* check, rendered suspicious only after it had left his hands and without his knowledge; or, on the other hand, a *reductio ad absurdum* in this shape, that if the bank pays the check and it turns out that it was irregular, the bank shall bear the loss, but if the bank refuses temporarily to pay, for purposes of inquiry, and the check turns out regular, then the bank shall be liable in damages. The latter horn leaves the bank no safety, save in the power of divina-

[1] § 415. The holder must be careful to show that the bank had funds at the time of presentment; it is not enough to prove that the drawer made sufficient deposits on that day. International Bank *v.* Jones, 15 Brad. 594; Richardson *v.* International Bank, 11 Brad. 582.

[2] Scholey *v.* Ramsbottom, 2 Camp. 485; Ingham *v.* Primrose, 7 C. B. N. S. 82.

tion. The extravagance of this real case ought to make it unquestionable that for sufficient cause the bank may demand time for inquiry without subjecting itself to a suit by the depositor, even though he be as innocent of the cause of suspicion as the bank itself. So far, indeed, as the reason of giving the depositor damages for a refusal is based upon the notion that his credit must suffer from it, the basis of the rule in such cases as the above is in great part destroyed. For it can injure no depositor's credit that the bank refuses to pay upon what it fears may be a fraudulent order, or a dishonest effort to secure his funds, if at the time it specifies this as the reason.

Such qualified refusal cannot injure drawer.

§ 446. **Insufficient Funds.** — (*a*) If an overdraft is presented for payment and refused, this creates no lien on the drawer's actual balance in favor of the holder of the overdraft. The deposit in the bank remains utterly unaffected by this; and the duties and relations of the bank to the drawer and to all other persons are in no respect changed.[1]

If the bank has not funds enough to the credit of the drawer to pay his check in full, it is not obliged to make payment in part.[2] Whether or not it would be justified in doing so, may be questioned. There is no authority on the point. Nor would banks often try to exercise such a right. If they can do so, they are obviously bound to indorse the amount of the payment on the check, which would of course still remain in the payee's hands, and which would otherwise on its face appear still to be good for the full value named in it, to the possible deception and loss of the drawer, or of innocent third parties. But the better rule perhaps would be, to save misunderstandings and complications, that, if a bank cannot pay in full, it not only may not, but must not, pay at all. The drawer has not requested it to make a part payment. He has demanded that it do a certain act; to wit, pay a certain sum of money on his account. If it will not do this act according to the terms of the authority embodied in the request, it by no means follows that it is authorized to substitute for it a

[1] § 446. Dana *v.* Third National Bank, 13 Allen, 445.

[2] Murray *v.* Judah, 6 Cow. 490.

partial performance, or in fact a materially different act. Power to pay only a part of a sum is not necessarily implied in an order, expressed without alternative, to pay that specific sum.

A device whereby the check-holder may seek to obtain payment, where his check calls for a larger amount than the drawer's balance at the time of presentment, is that the holder may himself pay in, or cause to be paid in, the amount of the deficiency, and have the same placed to the drawer's credit. The drawer's account being thus made good, the check might perhaps be safely honored by the bank. But the bank is not justified in informing the holder what is the amount of the deficiency, or what the state of the drawer's account. He must find it out elsewhere if he can, since the bank can give such information only at its own peril.[3]

But see below.

The above statement from the second edition of this work may perhaps admit of qualification. See § 294.

(*b*) In Illinois, the bank is held under no obligation to make a partial payment; for if it did, the check could not be taken and held as a voucher.[4]

And if the holder is unwilling to leave the check with the bank, this would be unanswerable; but if the holder offers to deliver the check, and especially if he offers to deposit enough to the credit of the drawer to make up the amount of the check, it is the bank's duty to pay the check and indorse the amount upon it. So it has been held in Pennsylvania.[5]

As between holder and drawer, the money clearly belongs to the holder; but as between these parties and the bank, it may be urged that the bank does not agree to go to the additional trouble of keeping such broken accounts, that its agreement is to pay if there are funds, and it will not bother with the matter at all if there are not enough to make the transaction clean. Still, the trouble of indorsing the amount paid upon the check, and giving the holder a memorandum of the transaction, would be

See further argument, § 294.

[3] Foster *v.* Bank of London, 3 F. & F. 214.

[4] Coates *v.* Preston, 105 Ill. 470.

[5] Bromley *v.* Commercial National Bank, 9 Phila. 522.

slight; and a spirit of accommodation in the interests of justice between other parties ought to induce the bank to pay, even if it may not be urged that, as servants of the public and enjoying privileges granted by it, they owe a duty in return to forward the public good and convenience in such matters.

§ 447. **In what Money Checks may be paid.** — The legal obligation of the bank is to pay the customer's checks in such paper or coin, and in such quantities of paper or coin of any specific denomination, as the law of the land makes legal tender in the case of any ordinary debt. Hence a tender, though of gold coin, if it be the coin of another country, is not sufficient. The question of value does not enter into the matter at all; *it is a question solely of legal tender*.[1] No other species of tender than that authorized by the laws of the land can relieve the bank from liability to the drawer.

Foreign coin insufficient.

But this obligation of the bank, at strict law, may of course be waived and dispensed with by the express or implied consent of the holder of the check. He is perfectly at liberty to accept any representatives of value which the bank may offer to him. If he does so accept, that is to say, if, at the time when such representatives are offered to him, he does not object to receive them on the ground that they are not what at law he has a right to demand, then this acceptance operates as a complete waiver of the holder's right to refuse anything save legal tender, and the banker is discharged by this payment, both as towards the drawer and the holder of the check. Even if the holder assents to take the promissory note of the banker, it will discharge the check absolutely, and without regard to the fact of whether or not it is paid at maturity.[2] Payments are usually offered either in whole or in part in the bank bills or notes, either of the bank on which the check is drawn, or of other banks, which circulate as currency in the community. The holder may

Waiver.

[1] § 447. Grant on Bankers and Banking, pp. 36–38, 40; Wade's Case, Rep. Pt. 5, 114 a; Co. Litt. 207 b; Lawrence *v.* Schmidt, 35 Ill. 440; and cases cited *infra*, which by implication support the same doctrine.

[2] Sayer *v.* Wagstaff, 5 Beav. 415.

refuse these, when offered to him, if he wishes; but if he takes them, in the absence of fraud on the part of the bank he assumes as his own the risk of their value. The waiver was perfected by the very act of acceptance, and cannot be afterward undone.[3] *E converso*, if it should happen that the funds are at a premium, the profit also is that of the receiver. In short, the money or representatives of value, on the moment when they have been paid over the counter and have been fairly received and accepted without objection by the payee, become the property of the payee, for good or for ill.

Special agreement as to what currency shall be paid.

Valid agreements may at any time be entered into between the bank and the customer concerning the species of money or currency in which his checks may or shall be honored. The holders of the checks need be no parties to this agreement. They have accepted from their debtor his check as a means of procuring money, but the bank is not therefore liable to pay them money. The nature of the duty of the bank to them is determined by the nature of its duty to the depositor. It is bound to offer to them whatever it has undertaken with him that it will offer to holders of his checks. If this be unsatisfactory to the holders, their sole recourse and remedy is against him. But an agreement of this kind does not cover checks drawn before it was entered into, though not presented till afterwards, unless they were in terms included. In the absence of an express stipulation concerning them, they remain payable in the same currency in which the bank would be bound to pay had no peculiar contract been entered into. For the arrangement by the drawer can have no bearing on checks previously issued, and on the accrued rights of the holders of them, which without his knowledge might still be unpresented.[4]

What is legal tender.

At present, in our country, the treasury notes of the United States have been made by Act of Congress a legal tender, and payment, or offer of payment, in them satisfies the duty of the bank; though if it has bound

[3] Polglass *v.* Oliver, 2 C. & J. 15; Vernon *v.* Bovery, 2 Show. 296.

[4] Marine Bank *v.* Ogden, 29 Ill. 248.

itself by a specific agreement to pay in gold or silver coin, it must do so. Even a State bank, organized under State laws, which in terms require all its payments to be made only "in gold and silver," has been held exonerated from this obligation by the supreme authority of Congress, and declared able to discharge all its indebtedness by tender of the treasury notes.[5]

§ 448. **Payment in Forged Paper or Counterfeit Coin.** — A payment in forged paper, or in counterfeit coin, does not discharge the bank. For, as has been already seen in the case of deposits paid into the bank in such material, they do not constitute a payment at all, but are simply a nullity.[1] In discussing payments made in counterfeit coin, Mr. Grant remarks upon the ease with which the charge of such a payment might be brought against the bank, and the great and almost insurmountable obstacles in the way of meeting and refuting it; and he says that the rule has therefore been laid down that the objection to the coin must be taken by the payee at the time when it is offered and taken, and that afterwards it will be too late. The difficulty which this rule seeks to obviate is certainly serious and substantial; but the rule itself is neither indispensable in order to meet this difficulty, nor is it intrinsically just. Fortunately Mr. Grant furnishes no citation of judicial authority for it. Why it ought never to obtain this support is easily shown. In the first place it is unjust, because it requires that every person requesting to have a check cashed, that is, pretty much every member of the community more or less frequently in his life, shall be an experienced, accurate, and rapid judge of the pureness and legitimacy of coin, or of the genuineness of bank notes. Receiving a considerable number of coins or notes at the bank counter, he must then and there, telling it over in the midst of the surrounding hurry of business, be able at once and surely to detect a counterfeit piece. Every one knows that this is simply an impossi-

Grant says the objection must be taken at the time.

Grant refuted.

[5] Carpenter *v.* Northfield Bank, 39 Vt. 46.

[1] § 448. Grant on Bankers and Banking, pp. 38–40; Camidge *v.* Allenby, 6 Barn. & Cr. 385.

bility. The rule works to him quite as great an injustice as that from which it relieves the bank. It renders it very nearly an absolute impossibility for him ever to obtain reimbursement. Then, further, the difficulty which the bank will encounter in refuting the charge is no reason whatsoever for refusing altogether to allow the injured person to prove his injury. It is a very poor rule of law that says, because the defendant has a hard task to defend himself, therefore it shall be arbitrarily laid down that no action shall ever be brought against him, and that a person who can show by the most perfect, absolute, and unanswerable proof that he has not been paid his debt, shall yet be forbidden to adduce such proof, and shall be strictly barred from the right of restitution, simply because he did not discover the fact in an instant. It is a hard thing to defend against a charge of rape, or of breach of promise of marriage; but even criminal prosecutions are still in vogue for the former offence, and considerable sums of money are allowed to change hands in suits for the latter. The true rule is obvious. It simply affects the burden of proof. The obligation upon the plaintiff to make out his case by clear, sufficient, incontestable testimony, may be drawn with all the sternness and rigidity which just consideration for the hard position of the defendant may demand. Every reasonable ruling concerning the comparative thoroughness of the proof to be required of each party respectively may be given and enforced by the court. But it is both folly and injustice to say, that if the plaintiff *actually proves* his right to restitution, yet he shall not have it, because *if* he had been in the wrong the defendant *might* have been practically unable to show it. Let the plaintiff be held to make out his case with any degree of thoroughness that perfect justice can demand, but if he does so make it out, then at least let him have his rights, so incontrovertibly and laboriously proved. The absolute fact, really shown, as it sometimes may be, beyond a doubt, must be allowed to draw after it the only consequence which is known to justice. For though the bank may have offered the false money unintentionally, and so may not be morally in fault, yet at strict law it has not fulfilled its legal

obligation, and it must answer for its failure to do so. It cannot be mulcted vindictively; but it must pay for the actual damage.[2]

Much stronger is the case where the bank tenders to the holder of the check the bills or notes of a bank which it knows, or suspects, or which it has reason to know or suspect, to be in failing circumstances; so that the bills or notes are of doubtful value, or likely rapidly to depreciate. In such case the act of the bank is fraudulent, and there is no reason why the depositor should not recover damages to the same extent to which he could recover for any other utterly wilful and causeless refusal to meet his drafts.[3]

§ 449. **Other Payments made and received in Good Faith cannot be recalled.** — From the moment that the act of transfer is completed, and the minds of the parties have met and agreed upon the thing transferred as constituting a payment, instantly the right of either to repudiate or annul the transaction ceases. If the bank discovers at once that the drawer's account was overdrawn before the check was paid, it cannot recall the funds from the possession of the holder, not even if he be still at the counter, provided the act of transfer had been perfected by the intent and act of both parties, leaving nothing further to be done.[1] But it is of course essential to the working of this doctrine that both parties should be acting throughout the transaction in perfect good faith. For if the bank tender bills or notes which it knows, or which it suspects, or has reason to suspect, are either depreciated or worthless, or are likely immediately to become so, and keeps this fact a secret from the payee, then the payment is not good.[2] *Quære*, whether, on the other hand, if the payee receives, or if he specially asks for, funds which he has private reasons for knowing to stand at a premium, the fact being unknown to and kept secret from the bank, he

When bank is guilty of fraud.

[2] Grant on Bankers and Banking, p. 38.

[3] Grant, pp. 41, 42.

[1] § 449. Chambers *v.* Miller, 13 C. B. N. S. 125; 3 F. & F. 202; Boylston National Bank *v.* Richardson, 101 Mass. 287.

[2] Spurraway *v.* Rogers, 12 Mod. 517.

will be allowed to retain the amount of the premium. Further, it is a fraud on the part of a holder, or payee of a check, to present it for payment, either at the counter to be cashed or through the clearing-house by depositing it in his own bank, provided he knows at the time that the drawer has not to his credit, in the bank on which it is drawn, any funds, or not sufficient funds to meet it. The holder has no right to attempt to mislead the drawer's bank into erroneously honoring the check, and then to keep the money if his *ruse* is successful. Under such circumstances the mistake of the bank will be revocable at any time after the completion of the transaction; and it may, if need be, recover the amount of the wrong payment in a suit directly against the payee.[3]

When holder knows the drawer has no funds.

§ 450. **Order of Payment, First come, first served.—Small Check after Large one has been refused. — Several Checks together. —** Strictly speaking, if the bank has, at the time of presentment of a check for payment, funds to the credit of the drawer sufficient to meet it, unpledged by any acceptance or undertaking of the bank on his behalf, and upon which no lien for any indebtedness due from him to the bank has attached, the obligation to pay accrues instantly. The bank has no right to defer the payment with the intention of making or refusing it at a later hour, according as it shall be influenced by subsequent occurrences. The rule with checks is, "First come, first served." If payment is demanded at noon upon a check which the depositor's unincumbered balance at that hour is sufficient to pay in full, the obligation of the bank to pay it in full is at once mature and perfect. It is no matter how many checks may be presented at later hours, or how much the sum of all the checks presented in the course of the day may exceed the amount of the customer's balance. This is no concern of the bank; not even if it has been informed that such checks have been drawn, and will be presented for payment. Its perfectly simple duty is to pay in full each check presented, at the time of presentment, so long as the unincumbered credit

[3] Martin *v.* Morgan, Gow, 123; cited to same point in Byles on Bills, p. 16.

of the depositor suffices to enable it to make such payments in full. When this credit will no longer suffice for that purpose, then the bank must refuse payment altogether. But it has no right to make itself an agent either of the customer or of the holders of his checks, or of both, with the view of securing an equal distribution, *pro rata*, of the deposit of the former among such of the latter as shall make their demands during banking hours in the same day. Any such proceeding is totally beyond the range of its powers and functions, and is a clear and unwarrantable usurpation of authority. Its rights to secure its own claims, of whatever nature, are shown in the chapter on "Lien and Set-off" to be ample. It is only so long as the customer's balance of all credits against all debits remains good that the checks should be paid.[1]

(*a*) The only position of difficulty which can be anticipated as likely to occur for the bank is presented by the supposition that a check for an amount exceeding the drawer's balance should be presented and refused for want of funds, and that afterwards a check small enough to be discharged in full from the balance should be presented. The duty of the bank in such a case has never been judicially determined, yet upon general principles little doubt can be entertained that the bank should cash this latter check. The fact of presentment for payment of an overdraft appears to have no legitimate effect whatsoever upon the balance of the customer. It creates no lien upon it of any description; no sound reason suggests itself why it should be regarded as affecting it at all. The bank is in no possible shape the agent of the holder of such over-check to aid in securing him payment in full; whence it seems to follow that the simple refusal, without more, of the larger check, furnishes no ground for a subsequent refusal of the later and smaller one.

Small check after large one refused.

The case of Munn *v.* Burch (*supra*) does not affect the principles just enunciated. That case was simply to the effect that, if a check was presented for payment, there being at that time funds enough of the drawer in the bank to meet it, payments by the bank on other checks subsequently presented to

[1] § 450. Munn *v.* Burch, 25 Ill. 35.

an amount so far depleting the depositor's balance that it would no longer suffice to meet the first check, would be improper and wrongful. If no sufficient excuse existed for the nonpayment of the first check, this conduct of the bank is obviously irregular, and unjust as towards the holder of the first check. The language held by the court would rather tend to sustain the view, that, if the inexcusable and wrongful act of the bank puts the holder of the first check to any vexation, delay, or loss, then the bank will be answerable to him in a suit for damages to recompense his injury. For clearly, as the court say, since the bank has done a wrong act, it must be responsible to the person upon whom the effects of the wrong fall. This person can hardly be the depositor, for his credit has been applied to his drafts, and though not in the order of presentment, yet this cannot be assumed to be a matter of any moment to him, since this order is quite beyond his control. But the holder of the refused check, if he has been obliged to lose time, or to be at the cost of legal proceedings to recover the sum which he ought to have received instantly for the mere asking, still more if he ultimately fail to recover that sum in full, is very substantially injured, and directly by the wrongful and illegal action of the bank.

How far the doctrine above laid down would be subject to modification by usage may be considered somewhat doubtful. *Prima facie* it seems a fair and almost a conclusive argument to say that a usage inconsistent with a rule of law so clear, so entwined with the whole code of laws governing checks, must be regarded as a usage bad at law, and invalid. The only authority which we have upon the point is English, and it covers only a part of the whole ground. It seems that in that country the usage of trade has been allowed by the courts to establish a rule: that a check drawn upon a banker in the city of London "may be retained by the banker on whom it is drawn until five o'clock P. M. of the day on which it is presented, and if there be no assets, it may then be returned to the person presenting it, and that too although it has been, in the first instance, cancelled by mistake, as intended to be honored." But it will be observed that this rule, though it coun-

tenances the retention of checks instead of immediate payment, out of deference to a usage merely, does not extend, or at least is not stated to extend, to the length of allowing the banker to return those checks, which at the time of presentment might have been paid, because by the summing up of all the checks presented during the day they appear all together to have amounted to an overdrawing. Mr. Grant, in laying down the very passage above quoted, authorizes by implication the position assumed above, and says: "A check of the ordinary kind is strictly payable, or at least intended to be paid, immediately on demand; and this appears to be universally the case, with the exception of checks drawn on bankers in the city of London," &c.[2]

(*b*) When a number of checks are presented in gross, amounting together to a sum beyond the deposit, the bank may properly pay the *first in date* so far as the funds will go. Such is the reason of the case,[3] though it seems to be thought in New York that the bank would not be obliged to pay any of them.[4] Priority. Several checks together.

§ 451. **Payment of Check by Credit given.** — A credit given for the amount of a check by the bank upon which it is drawn is equivalent to, and will be treated as, a payment of the check. It is the same as if the money had been paid over the counter on the check, and then immediately paid back again to the account or for the use for which the credit is given.[1] This rule has been applied where the bank held the check for several days, during which the drawer's account was not good, and then, the account becoming good, made the application.[2]

So also the certification of the check is, as between the bank and the *drawer*, payment of the check.[3]

[2] Grant on Bankers and Banking, pp. 64, 65, citing, to the custom of London, Fernandey *v.* Glynn, 1 Camp. 426, n., and Leftley *v.* Mills, 4 T. R. 175 (per Buller, J.).

[3] 2 Parsons, N. & B. 78.

[4] Dykers *v.* Leather Manufacturers' Bank, 11 Paige, 611.

[1] § 451. Oddie *v.* National City Bank, 45 N. Y. 735.

[2] Pratt *v.* Foote, 9 N. Y. 463.

[3] First National Bank of Jersey City *v.* Leach, 52 N. Y. 350; Bullard *v.* Randall, 1 Gray, 605. But see *contra*, Bickford *v.* First National Bank

§ 452. **Payment of Check after Insolvency of Bank.** — If a bank be insolvent, and its officers must be reasonably supposed to be cognizant of the fact, but nevertheless it continues for a time to conduct business, and during such period, at any time prior to actually stopping, pays in due and ordinary course of business the check of a depositor, neither the depositor nor the party receiving the money having any reason to know of the insolvency, the amount so paid cannot be recovered back as a fraudulent preference. "The act being done in the ordinary and usual course of business by the company, uninfluenced by the state of its pecuniary affairs, it cannot be said to be done in contemplation of any particular condition of such affairs."[1]

§ 453. **Duty of the Bank confined to simple Payment.** — The only act which the bank is under obligation to perform for the holder of the check is to pay it. It is not required to answer the abstract question whether or not the drawer has funds. It is not obliged to accept or to certify. It is not bound to promise to reserve funds of the drawer to pay it at any future hour or day. Its sole and entire duty is, at the time when actual and immediate payment is demanded, to make such actual and immediate payment. It may voluntarily bind itself by any other undertaking; but in doing so, it goes beyond what can be legally required of it. For its refusal to do anything, save to pay at once and in full, renders it liable to no action by any person whomsoever.[1] (See, however, § 294.) It is noted as one of the distinguishing differences between a check and a bill of exchange, that the former is presentable, as of right, only for payment, and not for acceptance.[2]

§ 454. **Payment by Mistake.** — When a bank honors a draft

of Chicago, 42 Ill. 238; Rounds *v.* Smith, id. 245; Brown *v.* Leckie, 43 id. 497; these cases are stated and discussed *supra*, under title "Acceptance and Certification."

[1] § 452. Dutcher *v.* Importers & Traders' National Bank, 59 N. Y. 5, overruling same case in 1 N. Y. 400; and discussing Robinson *v.* Bank of Attica, 21 N. Y. 406.

[1] § 453. Bradford *v.* Fox, 39 Barb. 203.

[2] Morse *v.* Massachusetts National Bank, 1 Holmes, C. C. 209.

by mistake of fact, the money may be recovered.[1] If there is no mistake of fact, but the bank, knowing the state of the maker's account to be below the amount of the note, pays it voluntarily, relying on the maker's credit, the indorsers are discharged; and the bank cannot retreat from the position it has assumed, though the maker should become insolvent, and notice be given which would have been sufficient if the bank had not discharged the indorsers by its previous action.[2]

There is no presumption of mistake, and it must be shown that the act of the bank was of this nature.[2]

Money paid with full information as to the facts, but in mistake of law, cannot be recovered.[3] But money paid under mistake of fact, the error not being negligent,[4] or if negligent not causing loss to the payee,[5] or if both negligent and causing loss, yet the payee was negligent equally with or to a greater degree than the payor,[6] can be recovered.

But if negligent in the payor, and the payee, being innocent of negligence, has altered his position on the faith of the payor's action, or lost remedies over, or in any way would be in a worse condition by correction of the mistake than if the payor had refused payment, the money cannot be recovered from the payee.[7]

A bank, by mistake, overpaid to A.'s clerk, on a check drawn by A., a certain sum. The clerk, upon his return to A.'s place of business on the same day, discovered the mistake, notified A. of it, and requested A. to allow him to return the money to the bank, and A. refused. Upon the clerk's next

[1] § 454. Troy City Bank *v.* Grant, 77 N. Y. 365.

[2] Farmers' Bank *v.* Vail, 21 N. Y. 485; Burkhalter *v.* Second National Bank, 42 N. Y. 538.

[3] Mutual Savings Institution *v.* Enslin, 46 Mo. 200.

[4] Citizens' Bank *v.* Grafflin, 31 Md. 507, where a bank paid a draft upon notice of protest for nonpayment on September 4, in ignorance that the draft had been protested for non-acceptance on July 22, no notice having been given it. Kansas Lumber Co. *v.* Central Bank, 34 Kans. 635.

[5] Union National Bank *v.* Sixth National Bank, 43 N. Y. 452; De Nayer *v.* State National Bank, 8 Neb. 104.

[6] Redington *v.* Woods, 45 Cal. 406.

[7] Stephenson *v.* Mount, 19 La. An. 295.

visit to the bank, within a few days, the bank teller asked him if he had been overpaid, and he denied it. The clerk reported this to A., who approved it, and afterwards kept the money without ever giving notice to the bank. The bank brought an action against A. to recover the money, more than six years after its overpayment. Held, that there was a fraudulent concealment by the defendant of the plaintiff's cause of action *within the Public Statutes*, c. 197, § 14; and that the action could be maintained.[8]

§ 455. **Mistake as to Funds.** — If a bank pays or accepts under the misconception that it has funds, it cannot recover from the holder, it must look to the drawer alone for redress.[1] But under the clearing-house rules a check paid through the clearing may be returned within a certain time, if the funds are found insufficient.

(*a*) In the case of the Merchants' National Bank *v.* National Bank of the Commonwealth, an interesting rule as to the measure of damages was laid down. The drawer of the check had in his bank some funds which might have been applied towards payment of his check at the time of its presentation through the clearing-house, but not enough funds properly so applicable to pay it in full. The court held that his bank having paid in full, and then returned the check as bad in season to recover from the presenting bank, could recover only the amount of the difference between the sum called for by and paid upon the check, and the sum in its hands which might have been applied upon it. The facts that a check which cannot be paid in full from the drawer's funds is usually returned to the drawer, and that the bank, in ordinary course of business, would doubtless not have made a part payment on the check, to the extent of the drawer's real funds in its hands, were declared to be immaterial.[2] The plaintiff was entitled to pay the check so far as it had funds, if it saw

Payment by mistake of funds.

The bank can recover only the difference between the funds it had and the amount paid on the check.

[8] Manufacturers' Bank *v.* Perry, 144 Mass. 313.

[1] § 455. Hull *v.* Bank, Dudley, 259.

[2] Merchants' National Bank *v.* National Bank of the Commonwealth, 139 Mass. 513.

fit, and the holder of the check was willing to accept a part; and having made a payment on the check, the bank is not only entitled to hold these funds in its possession for its own reimbursement so far as they will go, but it ought to do so for its own protection, and if it neglects to do so, its claim against the party to whom the mistaken payment has been made will be less by this amount than the total amount paid to him on the face of the check.[2] So far as the depositor had a right to draw, the defendant has now a right to hold.

§ 456. **Wrong Payments.** — C. drew a check post-dated the 22d, gave it to K., instructing him to get it cashed on the day of its date and give the money to C.'s foreman if C. did not return by noon of that day. K. changed the date to the 21st, got the money, and absconded. C. did not return till afternoon on the 22d. Held that the bank could not charge C. with the amount.[1] A bank can only pay in accordance with the directions of the drawer, and no fraudulent alteration can give it power to do otherwise. It can debit the deposit only with payments made at the time when, to the person whom, and for the amount authorized by him,[2] unless his neglect has opened the door to and invited the fraud.

Bank cannot pay except in exact accord with depositor's order.

Payment before date of a check will not discharge the bank, unless made to the true owner. So where a payee lost his check, and the bank paid before its date, it was held to repay the amount to the loser of the check.[3]

§ 457. **Payment to Wrong Person.** — If a bank pays to the wrong person, relying on false representations for which neither the drawer nor true payee were responsible, it pays at its peril.[1]

A. drew a check payable to B. to pay for a note and mortgage represented by a broker D. to be a genuine incumbrance on B.'s land. The note and mortgage were forged, and D. took a party to the bank identifying him as B., and the bank

[1] § 456. Crawford *v.* West Side Bank, 100 N. Y. 50.

[2] Wheeler *v.* Gould, 20 Pick. 545.

[3] Ibid.

[1] § 457. Dodge *v.* National Exchange Bank, 30 Ohio St. 1 (1876).

paid the check. The drawer recovered of the bank, on discovering that the mortgage, note, &c. was a fraud.[2]

Telegraph order.

(*a*) If A. is identified by a man of good character as the payee named in a telegraph order presented by A. to the bank, the bank is not negligent in paying him the money, though he should prove not to be the person named in said order.[3]

(*b*) If the drawer of a check on bank C., payable to the order of bank B., delivers it to A. to deposit in B. to the credit of the drawer, and A. deposits it in his own name as trustee of the drawer, and afterward draws the money, the bank is liable to the drawer.[4]

Bank negligent in not making inquiry.

(*c*) The plaintiffs received a check payable to their own order. They indorsed it, making it payable to the order of the cashier of the bank with which they were accustomed to do business; put it in an envelope with a deposit ticket; gave the envelope to a messenger, and directed him to carry it to the bank, have it credited to plaintiffs on their bank-book, and bring back the bank-book. The messenger on the way to the bank broke open the envelope, abstracted the check, presented it at the bank, and said that the firm wished to have cash for it. The cash was delivered to him, and he defaulted with it. The court held, but with two judges dissenting, that the bank must make good the amount to the plaintiffs; the circumstances of the presentment and demand were so peculiar as to put the bank upon its inquiry. The bank did not know the messenger; the indorsement did not indicate an intention to have the check collected in money; nor was it in the ordinary course of business to use the check of a third person, drawn upon another bank, as a substitute for the check of the plaintiffs drawn upon their own bank, against a deposit, in the usual manner.[5]

§ 458. **Customer's Right of Action for Refusal to Honor his Check.** — We have already stated that a bank is under obli-

[2] Kuhn *v.* Frank, Hamilton County District Court, Ohio, 10 Rec. 622.

[3] Bank *v.* Western Union Telegraph Co., 52 Cal. 280.

[4] Sims *v.* United States Trust Co., 9 N. E. 605 (N. Y., January, 1887).

[5] Bristol Knife Co. *v.* First National Bank of Hartford, 41 Conn. 421.

gation to pay the checks, drafts, and orders of a depositor so long as it has in its possession funds of his sufficient to do so, and which are not incumbered by the attaching of any earlier lien in favor of the bank. The duty of the bank to make such payments, and the reciprocal right of the depositor to have them made, arise from the contract to that effect which, though probably never definitely expressed, will always be considered to be implied from the usual course of the banking business.[1] This duty and this right are so far substantial, that, if the bank refuses, without sufficient justification, to pay the check of the customer, the customer has his action for damages against the bank.[2] It has been said that if in such action the customer does not show that he has suffered a tangible or measurable loss or injury from the refusal, he shall recover only nominal damages.[3] But the better authority seems to be, that, even if such actual loss or injury is not shown, yet more than nominal damages shall be given. It can hardly be possible that a customer's check can be wrongfully refused payment without some impeachment of his credit, which must in fact be an actual injury, though he cannot from the nature of the case furnish independent distinct proof thereof. It is as in cases of libel and slander, which description of suit, indeed, it closely resembles, inasmuch as it is a practical slur upon the plaintiff's credit and repute in the business world. Special damage may be shown, if the plaintiff be able; but, if he be not able, the jury may nevertheless give such temperate damages as they conceive to be a reasonable compensation for that indefinite mischief which such an act must be assumed to

Measure of damages.

[1] § 458. Byles on Bills, Sharswood's ed., p. *18; Downes *v.* Phœnix Bank, 6 Hill, N. Y. 297.

[2] Grant on Bankers and Banking, p. 45; Whitaker *v.* Bank of England, 6 Car. & P. 700; 1 C. M. & R. 744; Marzetti *v.* Williams, 1 Barn. & Ad. 415; Watts *v.* Christie, 11 Beav. 546; Rollin *v.* Steward, 14 C. B. 594; Birchall *v.* Third National Bank, 15 Weekly Notes of Cases, 174 (Phila. Com. Pleas, $600 recovered).

[3] Watts *v.* Christie, 11 Beav. 546; Marzetti *v.* Williams, 1 Barn. & Ad. 415.

have inflicted, according to the ordinary course of human events.[4]

The precedents from which an idea of the due and proper amount of damages which may be awarded where no special damage has been shown, are rare. In the case last cited the check drawn was only for £87 7*s.* 6*d.*, but the court seemed to regard the very smallness of the check as rather constituting grounds for greater damages than otherwise. For Lord Tenterden remarked, that it was a discredit to any person, and peculiarly to one in trade, to have a "draft for so small a sum refused." The jury had at first found for the plaintiff with only nominal damages; but the case having been given to them again, under the instructions to find substantial damages, coupled with the remark above quoted, they next returned a verdict for £500 damages. This seemed an error in the opposite direction. The court intimated that it was a very large sum, and the case was finally disposed of by arrangement of the parties between themselves that £200 should be paid as damages.

§ 459. **Bank's Defences.**—To the customer's suit for damages the bank may answer in defence, that it had not unpledged funds enough belonging to the customer to pay the check or draft in full at the time of presentment and demand. For a bank is never held to make a partial payment upon a check.[1] So if the bank has accepted, or in any manner pledged itself or made itself liable to pay checks, drafts, or orders of the same drawer to such an extent that, after reserving enough to meet their obligations, the balance to his credit would not suffice to meet the check in full, the bank need not, indeed must not, make any payment at all upon the same.[2] But if the bank itself at the time holds the promissory note or other business paper of the customer, which has not yet matured, it has no right to set aside funds enough to secure the payment of this when it shall mature, and then to refuse payment because the balance

Insufficient funds.

[4] Rollin *v.* Steward, 14 C. B. 594.

[1] § 459. In the Matter of Brown, 2 Story, 512.

[2] Kymer *v.* Laurie, 18 L. J. Q. B. 218.

after such appropriation does not equal the sum drawn for. It is only under authority of a court of equity that a bank can claim any lien on funds of its depositor to secure paper of his held by it, and still undue. Further, it is a good defence if the bank shows that funds of the drawer sufficient to make his credit good to meet the amount of the check had been paid into the bank so immediately before the presentment of the check, that the bank had not had a reasonable time to avail itself of the deposit. What is such reasonable time will depend upon the circumstances of each individual case. The general magnitude of the business of the bank, and especially the amount of business which happened to be transacting in the bank in the interval between the deposit and the presentment, also doubtless the organization and system of the bank in relation to such matters, the numerical strength and arrangement of its clerical force, and other similar matters, may be put in evidence by either side to sustain its position. Ordinarily, reasonable time would seem to be only till the bank could have a fair opportunity to "avail itself" of the funds; that is to say, get them into a condition such that it can mingle them with its general funds, and use them as money, and to communicate the fact of the deposit to the proper clerks.[3] In Rollin *v.* Steward a deposit was made at one o'clock, the check was presented at three o'clock on the same day, and the interval was held to be such a reasonable time that the banker was obliged to pay damages for refusing to cash it, though he remarked at the time that it might very probably go through the clearing-house the next day, and though in fact he did pay it on the next day.

Funds so recently arrived as to be unavailable.

Precisely what is the signification of the requisition that the bank should have time "to avail itself of" the funds deposited, is clearly indicated by no judicial decisions. If the funds be current money, native gold or silver coin, for example, simple receipt thereof and time to notify the paying clerks is sufficient. So doubtless if they be bank bills or

[3] Grant on Bankers and Banking, p. 45; Whitaker *v.* Bank of England, 6 Car. & P. 700; 1 C. M. & R. 744; Marzetti *v.* Williams, 1 Barn. & Ad. 415; Rollin *v.* Steward, 14 C. B. 595.

notes, provided they be in general circulation in the community for the full value expressed on their face. If A. deposit with his banker the check of B., also drawn on the same banker, time enough to examine the account of B., and if it be good for the amount to transfer the same to the credit of A., would also doubtless be a reasonable time. But if A. deposit in his bank the check of B. drawn on another bank, the naked unqualified rights of the bank certainly must cover a much longer period. In such a transaction A. simply makes the bank his agent for the collection of the check, with the understanding, express or more usually implied, that the amount when collected shall be placed to his credit. The bank of deposit has the ordinary time allowed for presenting the check to the drawee bank and demanding payment; a time which by the ordinary rule of the common law extends to the close of banking hours on the day following that of the deposit, but which may be restricted to a less period by the usage of the clearing-house. Then the credit is or is not given to the depositor, according as the check is or is not honored.

§ 460. **Possession of Paid Checks.** — When the bank has paid the check of a depositor, it is considered to be entitled to possession of it, as a voucher for the payment.[1] But this right to possession is not absolute and valid as against all parties. It is rather a right to demand and take the check from the holder, than a strict right to possess the same. It is the custom with most banks, whenever the depositor sends his book to be balanced, to return to him with it all the checks received and paid to the date of the balancing. An obligation to do this might perhaps be inferred in most cases from the usage of business and the prior course of dealing between the bank and the depositor. For it is probable that the habit is almost universal, and it is one which may be properly adduced in evidence.[2] But further than this, there is ground for holding that it is also a duty of the bank at common law to return

Drawer has a right to his checks after payment, unless they were overdrafts.

[1] § 460. In the Matter of Brown, 2 Story, 512; Byles on Bills, p.*21, Sharswood's note.

[2] Regina *v.* Watts, 2 Den. (Crown C.) 14 (p. 21).

his paid checks to the depositor. He is considered to have the better right to them, for they are regarded as his evidence of payment of his debt to the payee named in them. The bank is said to hold them only as his agent.[3] So far is this doctrine carried, that secondary evidence of the contents of a check cannot be introduced on the ground that the bank has possession of it; the bank, of course, not being a party to the case. Also notice to one to produce a check is sufficient, though it is in his banker's hands after payment. But at the same time there seems to be authority as well as reason for saying, that if the general right of property is in the drawer, yet a qualified right of property, or it may more properly be called a temporary right of possession, exists in the bank. A paid check can only be the subject of any value whatsoever for the purpose of serving as an item of evidence. In this capacity it has a double purpose to subserve. It is proof that the drawer has paid his indebtedness to the payee, but it is likewise proof that the bank has paid the sum named on account of the drawer. If the drawer is entitled to claim perpetual possession of it to protect him against the danger of a suit by the payee, so the bank, before giving it to the drawer, is entitled to his acknowledgment, express or implied, that it has rightfully paid that amount out of his credit or deposit. For this reason, the return of the check is usually contemporaneous with the balancing of the book; that is to say, with the statement of account rendered to the customer charging him with this item. Before the drawer can enforce delivery of the check to himself by the bank, he ought to be required, by his acknowledgment of the bank's payment, to render the check no longer essential to the bank as its only evidence of that payment. The law of the matter may be very well gathered from the case of Regina *v.* Watts (*supra*), where the arguments offered by counsel and the answers of the judges thereto, bring out the various points with great clearness.

Bank's possession is that of the drawer.

Bank is agent. See below.

[3] Regina *v.* Watts, 2 Den. (Crown C.) 14; Burton *v.* Payne, 2 Car. & P. 520; Partridge *v.* Coates, Ry. & Mood. 153; Grant on Bankers and Banking, pp. 72, 75.

But if check is overdraft, bank may retain till its claim against drawer is settled.

The general rule, as stated, is based, of course, on the ordinary presumption that the check was drawn against and paid from a deposit of the drawer sufficient for the purpose. In the exceptional cases where the check of one who has not any funds, or not funds enough to meet it in full, is paid by the bank, since the check may be the main link in the chain of proof of the bank's claim for repayment, it is fair to suppose that the rule would be so far modified as to allow the bank to retain the check, like a promissory note, as the evidence of indebtedness, until the indebtedness is discharged. So if an intention or understanding could be shown to the effect that the check should remain in the banker's hands, after his payment upon it, as a kind of security upon which he might, if need should be, proceed against his depositor, clearly this intent of the parties would override the general rule until such time as the banker should have been reimbursed.[4] Grant says that in case of an overdraft the banker might have a "right to retain the checks, because to part with them would be to put beyond his control the only conclusive evidence he might have of the loan, beyond the entries in his own books corresponding with the checks, which would be perhaps open to the objection, that to let them in would be to allow the making of evidence in a man's own favor."[5]

§ 460 A. **Checks on other Banks.** — It has been declared not to be in the ordinary course of business for a bank to pay in cash over its counter a check drawn on another bank, although such check be indorsed by the payee, and the payee is a customer of the paying bank. Properly speaking, it is said, such a check ought to be deposited for collection, and the depositor should draw his own check for whatever amount he wants. If the bank does so cash the check, and there proves to be anything wrong about it, the bank stands at the disadvantage always attendant upon having done an act not

[4] Grant on Bankers and Banking, p. 73, and cases cited, which, however, it must be confessed, at best leave this principle to be inferred, and are far from distinctly enunciating it.

[5] Grant on Bankers and Banking, p. 81.

in the ordinary course of business.[1] The transaction is said to be too much like the *purchase* of a check, which a bank has no right to make.

It must be remarked, however, that the purchase of a check, if for full value, is proper, according to the best authority, and that there is no objection ever raised to a deposit of checks on other banks, credit given and made absolute (by agreement, or by implication in some jurisdictions), and drawn against; yet this is substantially a purchase.

[1] § 460 A. Bristol Knife Co. *v.* First National Bank of Hartford, 41 Conn. 421.

CHAPTER XXXIII.

FORGERY OF CHECKS.

§ 461. Analysis. See Forgery of Bills, §§ 633, 659.

A. The Principles chiefly to be kept in mind are, —

(1) Forgery can carry no title even to a *bona fide* holder; otherwise, any man might be forged out of house and home, and rendered a pauper without an act upon his own part. No one would have any security for a moment.

(2) If negligence or want of ordinary care and prudence produces loss, the law will put the burden upon the one who is guilty of the carelessness.

(3) Negligence alone can give no one a claim against the party remiss; there must also be *loss naturally resulting from the negligence*, and resulting *to* the person who makes the claim. Great confusion has arisen by failure to remember this elementary principle.

(4) When two parties are equally negligent, the one guilty of the primary neglect should bear the loss; as where a bank pays on a forged indorsement, the genuineness being a fact equally within the reach and duty of inquiry by both parties, and the holder's neglect being prior to that of the bank, he must, as between himself and the bank, bear the loss. (If the two negligences enter equally into causation of the loss, and are not distinguishable as to priority and dependence one on the other, but are independent, neither one having opened the door for the other, it would seem just that the loss should be *divided*, and the idea might very well be applied to any case where the negligences are equal, and each one essential to the loss, for the real object of the law should be to repress negligence, and to distribute loss in *proportion* to the manifestation of qualities detrimental to society and producing the loss, and this would require that neither negligent party should escape a portion of the burden, into the causing of which his fault entered as a factor.) The law has not as yet adopted the latter rule, though there is a tendency in this direction, especially in Illinois.

§ 468. (5) Whoever pays a check, knowing it to be a forgery, or issues, ac-
§ 478. knowledges, or certifies it with such knowledge, binds himself.

B. As between the Bank and the Drawer.

For the drawer's duty, and what will make him liable, see B. 1, *c* and *d*, and B. 3, *a*.

(1) Forgery of the drawer's signature.

(*a*) The old rule was that the bank was bound to know the drawer's
§ 463. signature. The money could not be recovered from the person to whom it was paid by the bank, and the drawer could
§ 467. not be charged with the amount, nor was he bound to any diligence in examining his accounts or checks returned to him from the bank.

§ 464. (*b*) This rule is unreasonable and in violation of the third principle above, and has been and is being replaced by

§ 466. (*c*) The better rule, which is, that although the bank may be negligent in not discovering the forgery of the drawer's signature, yet if the person to whom it paid the money would not be in a worse position by correction of the mistake than if payment had been refused by the bank, the bank may recover the money thus paid in mistake of fact. And further, that the drawer is bound to exercise ordinary care and diligence in the examination of his accounts with the bank and the vouchers returned to him. He may do this personally or through an agent, and if the agent is negligent, his fault is imputable to the drawer; but the crime of a clerk in forging his principal's name cannot be imputed to the principal, nor his guilty knowledge, but only such knowledge as an honest and ordinarily careful clerk could obtain by examination of the accounts and vouchers.

Principle (3), above, A.

Principle (2), above, A.

§ 473. (*d*) The drawer's duty does not extend beyond reasonable ordinary care, and he is not obliged to make immediate examination. Mere silence after receiving his bank-books and checks will
§ 470. not make him responsible unless guilty of neglect, nor will careless habits as to leaving his check-book, stamp, &c. easily accessible make him liable.

§ 468. Even if he pronounces his signature to be genuine, he may afterward protect himself by proving the forgery, except against one who has acted on the faith of his representation, or except he knew at the time he adopted the
§ 469. signature that it was forged.

Principle (3).

§ 474. (*e*) If the drawer is guilty of neglect, opening the door to the fraud,
§ 471. or if he
§ 477. Ratifies the payment, or
Issues the paper with the forgery on it, the bank can charge him
§ 468. with the amount paid on it.

(2) Forgery of an indorsement.

§ 474 *a*. The bank must pay according to the drawer's directions, and if it pays upon the order of any person other than the one designated by the drawer, it cannot charge the drawer with the payment, unless

§ 474 *e*. The drawer has been guilty of the prior neglect in causing the loss, or has ratified the payment. § 471.

§ 474 *c*. When the bank pays to a person of the same name as the real payee, if it has used all the means of identification given it by

the drawer, it should not be held; but the law wavers on this point between common sense and technicality.

§ 474 *b*. By statute in England, an indorsement apparently correct is authority to the bank to pay.

§ 474 *c*. Drawer's duty, and what circumstances may make him liable. See B. 1, *d*, and B. 3, *a*.

(3) Fraudulent alteration of checks.

§§ 469, 480. (*a*) Money paid in such cases is the bank's loss, unless the drawer's
§ 474 *c*. negligence was contributory, or he has rendered himself liable
§§ 477, 46 by adopting the check, or ratifying the payment, or has es-
§ 471. topped himself by subsequent neglect of due care in examina-
§ 472. tion, or in giving notice of the forgery when known.

C. As between the Bank and the True Owner.

Paper paid on forged indorsement.

§ 474. The generally adopted doctrine is that the true owner can sue the bank and recover the money, for a forged indorsement can give no title, and payment to one who had no right to receive cannot discharge the duty of the bank to pay the one who has a right to receive; and although a check-holder cannot in some States sue the bank until acceptance, it is usually held that payment of the check amounts to acceptance of it, and the bank thereafter holds the amount for the true payee.

Principle (1), in A, above.

The United States Supreme Court, however, denies the payee's right of action, holding such payment not an acceptance.

D. As between the Bank and the Person receiving the Money.

(1) If the drawer's signature is forged, the bank, having better means of information than the holder, is deemed guilty of the greater
See B. 1. negligence in failing to discover the forgery, and can only recover
§§ 463, 466. if the holder would be in no worse position by correction of the mistake than if payment had been refused when the check was presented at the bank.

(2) If an indorsement be forged, the parties being equally bound to
§ 474. inquire, having equal means of information, and the neglect of
§ 476. the holder being prior, the bank may recover, except where the
§ 476 *a*. drawer has rendered himself liable on the paper, (and then the bank has no need to recover of the holder, for it can charge the drawer,) and except cases in which the holder took the check
§ 476 *c*. subsequently to its certification by the bank.
§ 476 *b*. It is no objection to recovery, that the holder has suffered by delay in discovering the forgery.

(3) If the check is fraudulently certified, and, on being shown to the teller, is pronounced good by him, it is equivalent to an original
§ 478. certification, and the bank cannot correct the mistake if the holder has acted or omitted to act on the faith of it.

(4) If a check is fraudulently altered,

§ 479. (*a*) After signature, the bank can recover of the holder.

If a check is raised after certification,

(*b*) Though it is negligence in the bank not to know its own obligation, yet it may recover the excess paid, unless an innocent

§ 481 party would be prejudiced, and put in a worse position by correction of the mistake than if the bank had refused to pay the excess.

(*c*) If a check is raised before certification,

The rule generally adopted is, that certification warrants only
§ 482. the drawer's signature and funds, and any excess paid on a check raised before certification may be recovered, unless the
§ 482. (*d*) drawer negligently left the door open for the alteration.
§ 482. (*e*) But the bank must not intentionally or carelessly do anything to mislead the holder, nor neglect the customary references to sources of information in its possession.
§ 482. (*f*) And in Louisiana, it is held that a holder taking after certification takes on faith of the bank as to the amount, as well as to the signature and the existence of funds.

(5) An indorsement or transfer of negotiable paper warrants its genu-
§ 477. ineness, and on this ground the bank may recover of the transfer-
§ 487. rer at any time the forgery may be discovered, and the transferrer may then recover from his transferrer; no notice of dishonor, ac-
§§ 487–489. cording to the ordinary rules of the law merchant, is necessary in such cases.

(6) Special circumstances.
§ 466 *b*. Usage for the first bank taking paper to inquire as to its genuineness. The drawee can recover, if the taking bank failed to follow the usage.
§ 466 *f*. If the holder failed to impart suspicious facts, or failed to require
§ 466 *g*. proper identification of the party from whom it took the paper, or
§ 466 *a*, *b*, *c*, *d*. was guilty of any contributory negligence whatever, the drawee may recover.

(7) Pennsylvania statute law has adopted the modern doctrine ex-
§ 466 *h*. pressly; holding that the bank may recover from the holder in all cases except where the holder is innocent of primary or contributory neglect, and the bank's neglect, if corrected, would prejudice such innocent person.

E. Time.

§ 487. Some cases held that the forgery must be discovered in time to allow
§ 488. of the notification of prior parties within the regular period for notice of dishonor.

But the better doctrine is, that no length of time will prevent re-
§§ 487–489. covery if notice is given promptly upon discovery, and even the United States government is subject to this rule; the maxim that no laches can be imputed to the sovereign will not save it. A right of recovery never arises except on condition of promptness. § 489 *e*.

Every transferrer warrants the genuineness of negotiable paper transferred, and no notice is necessary to charge previous parties when the paper turns out to be void. § 487.

F. As between the Bank and the Purchaser

§ 483. (1) Of a draft, there is no right of recovery on account of the raising of the draft after leaving the hands of the purchaser.

(2) Suspicion.

§ 484. The character of an alteration as being suspicious or not depends on the significance of the words erased or altered, not on the fact of their being printed or written.

(3) Material.

The alteration must be material.

(*a*) An alteration in date may be material.

§ 485. (*b*) An alteration in the figures is not.

(*c*) Erasing a signature and rewriting the same is forgery.

(4) If a check signed in blank is fraudulently filled up, the loss must fall on the one who ran the risk of executing the instrument in blank.

Forgery of Signature.

§ 462. **Comparison of Bills and Checks.** — Where a forged check is presented to the bank upon which it purports to be drawn, and is paid by that bank, the question as to who shall bear the loss arises, as between the bank, the payee, and the drawer, so soon as the forgery is discovered. An examination of the cases will show that the law, or rather the practical application of the law, concerning this matter has undergone a gradual but very substantial change. In the discussion of the subject, the authorities concerning bills of exchange and checks must be regarded as being in nearly all instances interchangeable. The only important distinction lies in this: that if a forged bill be presented by the payee to the drawee for acceptance, and he accepts it, and thereafterward it changes hands, and before maturity comes into the possession of some third party, *bona fide* and for value, the acceptor is estopped to defend on the ground of the forgery of the drawer's signature: for the bill having been properly presented to the drawee as being presumably the person best able to determine its genuineness, and he having given to it credit and currency by his acceptance, he has thus by his own act led other persons into their subsequent acts, and those who have received the instrument upon the strength of his representations are entitled to recover from him its apparent value. The person who holds an uncertified check occupies the position of the payee of the bill, not of the person who, subsequently to acceptance, be-

Bank. Drawer. Payee.

Cases on bills and checks interchangeable.

Acceptor or payor held to know drawer's signature.

comes the purchaser of the accepted bill. Yet there is one particular in which there must often be a substantial difference between them. The bill is presented for sanction or repudiation to the only person presumably able to determine its genuineness. His acceptance gives it value, credit, and currency. People are governed in their actions by their faith in his representation. The bank which pays a check does not assume precisely this position. It must, however, not unfrequently come within the *logic* of the rule. For the matter of payment or nonpayment may often be the cause of some action or inaction on the part of the payee, which would give him an equal equity with that of the person who acts or refrains from acting upon the strength of the acceptance of the bill or draft.[1] The certification of a check corresponds closely with the acceptance of the bill, and, as will be seen farther on, is governed by the same rules.

There is some slight ground for supposing that the rule would be construed with even greater stringency against a bank which had paid a forged check or bill of a customer, than against an individual drawee who had paid a forged bill. For it may be supposed that, in the ordinary course of business, it must generally happen that a bank has vastly more frequent opportunities for becoming acquainted with a depositor's signature than a mere business correspondent can have. At any rate, this seems to be an argument which the courts will hear and consider. For instance, in Smith *v.* Mercer (*post*), the court said: A banker "is even more bound" to know a customer's handwriting than a drawee is bound to know a drawer's."

Forgery of Signature, Bank v. the Person receiving the Money.

§ 463. **The Old Rule**, which has been frequently and positively reiterated in England and in the United States, is, that the banker is bound to know the handwriting of his customer; the drawee is bound to know the signature of his

[1] § 462. Bank of St. Albans *v.* Farmers & Mechanics' Bank, 10 Vt. 141; Price *v.* Neale, 3 Burr. 1355.

Bank held to know *drawer's signature*, and it must bear the loss as between bank and holder.

drawer. Whence it follows that, if the banker or drawee makes a payment or gives credit upon the strength of a forged signature, the loss must be his as between himself and the holder. The blunder is his; he has not known what he is bound to know. Having parted with his money by reason of his own culpable negligence, he cannot be permitted to recover it back again when he afterward discovers his error. Thus said Chief Justice Mansfield, in a case[1] which arose in 1762, concerning a forged bill of exchange. A drawee had paid one bill which had been drawn against him, and had accepted and subsequently paid a second bill. Both bills had been forged by one Lee, who, as the reporter casually remarks, "has since been hanged for forgery." The drawee sued the holder to recover back the money paid. His Lordship stopped the defendant's counsel short, saying that the case was one of that description that could never be made plainer by argument. "It was incumbent upon the plaintiff to be satisfied that the bill drawn upon him was the drawer's hand, before he accepted or paid it. But it was not incumbent upon the plaintiff to inquire into it. . . . The plaintiff made no objection to them at the time of paying them. Whatever neglect there was, was on his side. . . . It is a misfortune which has happened without the defendant's fault or neglect." It was too late for the plaintiff to seek to mend matters after he had "lain by till the forger had come to be hanged."

This has since been a leading case. Mr. Justice Story, in 1825, said of it, that it "has never since been departed from; and in all the subsequent decisions in which it has been cited,

[1] § 463. Price *v.* Neale, 3 Burr. 1355. See also the earlier cases, Wilkinson *v.* Lutwidge, 1 Str. 648; Jenys *v.* Fowler, 2 Str. 946; and the later cases, Smith *v.* Chester, 1 D. & E. 655; Barber *v.* Gingell, 3 Esp. 60; Bass *v.* Cline, 4 Maule & S. 13; Smith *v.* Mercer, 6 Taunt. 76; Foster *v.* Clements, 2 Camp. 17; Bank of Commerce *v.* Union Bank, 3 N. Y. 230; Weisser *v.* Denison, 10 N. Y. 68; The Commercial & Farmers' National Bank of Baltimore *v.* The First National Bank of Baltimore, 30 Md. 11; Bernheimer *v.* Marshall, 2 Minn. 78; First National Bank *v.* Ricker, 71 Ill. 439; and other American cases cited *post* in this discussion.

it has had the uniform support of the court, and has been deemed a satisfactory authority."[2] In Goddard *v.* Merchants' Bank,[3] Ruggles, J., in an opinion in which he agreed with his colleagues as to this principle, though dissenting as to its application in that especial case, remarked that this general rule "should not be departed from or frittered away by exceptions resting on slight grounds, and cannot be overruled without overthrowing valuable and well settled principles of commercial law." In a subsequent case, Allen, J. quotes this language with approbation, and says: "A rule so well established and so firmly rooted and grounded in the jurisprudence of the country ought not to be overruled or disregarded. It has become a rule of right and of action among business men, and any interference with it would be mischievous."[4] Price *v.* Neale has never yet been "overruled," but whether it has been "frittered away" is a question which the reader must answer for himself when he concludes this discussion. Judge Phelps, of Vermont, has criticised it as being too sweeping, according to modern interpretations of the law. Lord Mansfield "entertained the opinion that there was no remedy against a person who should innocently put off a forged security. . . . On the contrary, it seems now well settled, that a person giving a security in payment, or procuring it to be discounted, vouches for its genuineness.[5] This rule, however, has never, to our knowledge, been extended to the case where the party, when receiving or discounting the paper, is presumed, from his relation to it, to have the means of correct knowledge as to its genuineness, or where it has been kept for an unreasonable time without notice to the other party of its spurious character."[6] These remarks intimate the manner in which the breadth of the rule has been pared down.

Limitation.

The earliest case in this country is that of Levy *v.* Bank of

[2] Bank of the United States *v.* Bank of Georgia, 10 Wheat. 333.
[3] 4 N. Y. (Comst.) 147.
[4] National Park Bank *v.* Ninth National Bank, 46 N. Y. 77.
[5] See Cabot Bank *v.* Morton, 4 Gray, 156.
[6] Bank of St. Albans *v.* Farmers & Mechanics' Bank, 10 Vt. 141.

the United States.[7] The plaintiff deposited a check, purporting to be drawn upon the same bank in which he deposited it by another depositor in that bank. He received credit for the amount of it in his cash-book in the usual form. On the afternoon of the same day it was discovered to be a forgery, and was at once returned to him. Thereupon the bank refused to recognize the credit; the depositor sued to recover the sum, and obtained a verdict, which the Supreme Court declined to interfere with. The acceptance of the check by the defendant, and giving credit, therefore, were held to conclude the defendant, although the case *in its favor was a very strong one, by reason of the prompt discovery of the forgery, and notification thereof within the same day.* The court rely upon the rules governing bills of exchange, but remark further, that the modern cases notice another reason for the defendant's liability, "which we think has much good sense in it; namely, that the acceptor is bound to know the drawer's handwriting, and by his acceptance to take this knowledge upon himself."

Credited check. Payment by credit not conclusive against bank.

Not good law now. See Title, and Revoking Certification.

It may be remarked here, that the giving credit by a bank to its depositor upon a false check upon itself deposited by him is, in law, equivalent to an actual payment. Besides the foregoing case, all the authorities, no less than the simple reason of the thing, are conclusive upon this point.[8]

In like manner, where a clerk had authority to draw checks, signing his employer's name thereto, for a stated period, and the bank had notice of the limitation of time, but the clerk continued to draw checks in the same manner after the lapse of that time, it was held that the bank could not charge the depositor with the amount of any checks paid by it which had been drawn by the clerk after his authority had expired.[9]

Bank's negligence.

[7] 4 Dall. 234; 1 Binn. 36; and see statement of this case in Bank of United States *v.* Bank of Georgia, 10 Wheat. 333, at p. 354.

[8] See National Bank of North America *v.* Bangs, 106 Mass. 441; Bank of St. Albans *v.* Farmers & Mechanics' Bank, 10 Vt. 141.

[9] Manufacturers' National Bank *v.* Barnes, 65 Ill. 69.

This view has been taken by the court of Minnesota, in a very sound, just, and well reasoned opinion.[10] Goddard *v.* Merchants' Bank (*post*, p. 771) is doubted, criticised, and not followed; it is regarded as being not in accord with authorities or with common sense. If the drawee chooses to pay the draft without being at the trouble to inspect it, he has only himself to blame if he pays upon a forgery; he is guilty of such neglect as would preclude him from recovering from the innocent payee or presenter. Were the law otherwise, no drawee would ever look at any draft, but would take good care to have it paid only upon inspection by his clerk, so as to keep the door open for a recovery in case of forgery.

Minnesota.

A bank cannot recover money paid on a forgery of the drawer's name, from the person to whom it was paid. The bank is bound to know the signature of the drawer.[11]

Bank cannot recover from holder.

A case arose in Vermont as follows. A check, payable to "J. W. or bearer," was presented to a bank, not being the bank on which it was drawn, with the request that the bank would purchase it. The bank did so, and J. W. indorsed the check over to the cashier. It was duly paid, or credited in account, by the bank on which it purported to be drawn, but afterward was discovered to be a forgery; whereupon the drawee bank sued the purchasing bank to recover back the amount. The plaintiffs asked for an instruction, that, if the jury should find that the cashier of the purchasing bank received the check without due circumspection or the exercise of due diligence in ascertaining its genuineness or the title of the person presenting it, the plaintiffs were entitled to recover. The instruction was not given, and exceptions taken by the plaintiff were not sustained. The court thought it necessary only that the defendants should appear to have received the check in the ordinary course of business and in good faith. That receiving

Vt.

No recovery when drawer's signature forged.

[10] Bernheimer *v.* Marshall, 2 Minn. 78.

[11] National Bank of Commonwealth *v.* Grocers' National Bank, 35 How. Pr. 412.

it without any especial inquiry sufficiently satisfied these requirements was not seriously doubted.[12]

Maryland.

In a Maryland case there was evidence of a custom similar to that offered in the case of Ellis *v.* Ohio Life Insurance & Trust Co. (*post*, p. 774); but the court said: "We do not mean . . . to decide that a case may not arise in which bank officers and agents may, in receiving a check, act in a manner so grossly negligent, even without *mala fides*, or by their conduct so mislead and lull into security the bank called upon to pay, as to excuse its failure to immediately detect the forgery, and where a jury may very properly be allowed to pass upon such conduct and negligence as most essentially facilitating the fraud, and occasioning the loss, and find a verdict accordingly. But in view of the long series of decisions settling the law so as to protect innocent holders for value, a much stronger case must be made out than is presented by this record. There is no pretence of bad faith on the part of the defendant. It received the check in the ordinary course of business, and sent it through the usual channel for payment. We cannot sanction so loose a doctrine as to hold that the fact that it came through the clearing-house affords any shadow of excuse to the plaintiff. The law attaches no sanctity to this source of communication, and none in fact can be imputed to it. The legal effect of what was done here, as in every case of presentment and demand, is this: the defendant said to the plaintiff, 'We hold this check on your bank, purporting to be drawn by one of your customers, and demand its payment'; and it can make no difference through what source this demand was made, whether by letter, or by special messenger, or through the clearing-house." [13]

Ohio.

In an Ohio case, a person owing money to A. gave a check, payable to the order of A., to a person unknown to him to be A., but who said that he could identify himself at the bank as A. It was held that the

[12] Bank of St. Albans *v.* Farmers & Mechanics' Bank, 10 Vt. 141.

[13] Commercial & Farmers' National Bank *v.* First National Bank of Baltimore, 30 Md. 11.

drawer had been guilty of no such negligence as would render him liable to the bank which had paid the money to the person to whom the check was delivered, without requiring him to prove himself to be A.; the fact being that this person was not A., and had forged A.'s indorsement.[14] If the laches of the maker of the check was not at least as great in this case as that of the defendants in National Bank of North America *v.* Bangs (*post*, p. 775), it is difficult to see in what laches consists.

The following case, though a just judgment on the facts, is faulty by reason of announcing the old rule as a basis of decision. The parties to whom a draft, payable to order, had come by mesne indorsements, presented it to the drawee for payment, with the remark that it was the draft of C. M. (the drawer). In fact it was not the draft of C. M., whose signature had been forged. But the drawee paid it without detecting the forgery. Afterward, in suit by the drawee against the presenter to recover back the amount, the court said that there was no other representation as to the genuineness of the draft than a remark ordinarily made in course of business, and which did not amount to a warranty by the presenter, nor properly tend to throw the drawee off his guard. Every presenter of a draft says by implication, if not in direct terms, "Here is the draft of A. B., which I wish you to pay." All that is intended is that the draft bears the signature A. B., or purports to be the draft of A. B. The presenter does not mean, and is not understood to mean, to guarantee genuineness; he is not the party who is bound to know the signature, and reject it if forged; but the drawee is so bound, and must make the examination, and abide by his opinion and action consequent thereupon.[15]

Minnesota.

§ 464. **The Old Rule Unreasonable.** — The old doctrine was that a bank was bound to know its correspondent's signature. A drawee could not recover money paid upon a forgery of the drawer's name, because, it was said, the drawee was negligent

[14] Dodge *v.* National Exchange Bank, 20 Ohio St. 234.

[15] Bernheimer *v.* Marshall, 2 Minn. 78.

not to know the forgery, and it must bear the consequence of its negligence. This doctrine is fast fading into the misty past, where it belongs. It is almost dead, the funeral notices are ready, and no tears will be shed, for it was founded in misconception of the fundamental principles of law and common sense.

(1) It is not enough to create legal liability, or to give A. a right to acquire or retain the property of B., to show merely that A. has been negligent; if so, property would be changing hands so rapidly that it could not be seen in transit, any more than the spokes of a bicycle. One more element is necessary, namely, that damage to A., being himself innocent in the matter, should naturally and proximately result from B.'s negligence.

This principle underlies the whole doctrine of negligence; as many times as there are cases in the books involving the question of liability for negligence, the necessity of both elements has been illustrated and enforced, except in the old forgery cases. They are strangely off the track, for in them it is held that the mere fact that B. was negligent gives A. a right to B.'s property, which A. did not have before the negligence, (for no case affirms that the holder of forged paper has any right to demand payment of it until it is accepted,) without regard to the question whether A. has sustained any loss by the negligence or not.

(2) The drawer or maker is himself sometimes deceived by a forgery of his own signature, and it is held that he may correct the mistake provided it can be done without putting an innocent holder of the paper in a worse position than he would have been if the drawer or maker had discovered the forgery upon presentation of the instrument.[1] Why should a bank be held to a stricter knowledge of the drawer's signature than the drawer himself?

The maker of a note paying innocently upon his own forged signature may sue the person who received it;[2] for money

[1] § 464. Woodruff *v.* Munroe, 33 Md. 158; Brook *v.* Hook, L. T. R. 21 Exch. 34.

[2] Carpenter *v.* Northborough National Bank, 123 Mass. 69; Welch *v.*

paid by mistake may be recovered even though the payor was negligent,[3] unless his negligence has caused loss to an innocent party.

The old cases would not hold the drawer to any diligence in discovery of the forgery of his name; he was not bound even to examine his accounts, as men of ordinary prudence are in the habit of doing; and even if he told the bank that the signature was his, he could afterward prove the forgery unless the bank expressed suspicions at the time it asked his opinion, and brought to his attention the fact that it might lose remedies over by his mistake in the matter, and such loss actually followed. The bank was bound to know the drawer's signature, "because it must be presumed more familiar with it than the payee or holder," and it was "negligent in not making proper examination, which would have led to the discovery of the forgery"; therefore it was held to bear the loss. Now apply these reasons to the drawer, and it will be hard to see the consistency of releasing the drawer from all responsibility and putting the whole burden on the drawee, as the old cases did.

(3) If a bank receives forged bills purporting to be its own, it can, upon reasonably prompt discovery of the forgery, return them.[4] Is it harder for the bank to know its own paper than that of its depositors, and is it less negligent in receiving forgeries of its own name than in paying upon a forgery of some one out of a hundred or a thousand customers?

(4) If a bank certifies a check by mistake, and notifies the holder at once, before he has transferred it to a *bona fide* holder, or lost any rights upon it, the certification is revoked,[5] why does not the principle equally apply to payment?

(5) If a check is paid through the clearing-house, and the

Goodwin, 123 Mass. 71. There was fraud and misrepresentation in this case, but the court said this was not an essential element.

[3] Lawrence *v.* American National Bank, 54 N. Y. 435.

[4] Gloucester Bank *v.* Salem Bank, 17 Mass. 44. See Young *v.* Adams, 6 Mass. 182; Eagle Bank *v.* Smith, 5 Conn. 71.

[5] Bank *v.* Baxter, 31 Vt. 101; Second National Bank *v.* West. National Bank, 51 Md. 128.

drawee discovers it has no funds, it may return the check even after the hour set by the clearing-house rules, if the payee bank has not lost its rights by the delay or altered its position,[6] though of course the drawee bank will be liable for damages caused by violating the rules. If such recovery be allowed in case of mistake as to sufficiency of funds, much more should it be allowed in case of forged paper. For it may very well be argued in case of any payment good except for want of funds, that it would save circuity of action to hold the drawee to the payment and give it no remedy except that against the drawer, instead of allowing it to sue the payee, and the payee be referred to the drawer; and if the drawer were solvent this might do, though it is clear that it would be unjust to hold the bank in this manner if the drawer had become insolvent, and the bank had given notice of its mistake in time to save the holder all his rights and remedies just as if payment had been refused.

But even this argument cannot be made in case of forgery; for (except in rare cases where the drawer acknowledges his signature or otherwise estops himself) the bank can have no right to charge the amount paid to the drawer.

(6) Every transferrer of a chattel warrants title, and the actual existence of what he transfers, and this rule applies as well to bank bills, notes, checks, and coin as to the transfer of a horse. A counterfeit bill or forged check is nothing, the consideration of the contract fails utterly, as much as though a horse sold was a dead horse, the mere form of a horse. Payment or deposit of such nothings raises no debt, and any money paid upon account of the transfer of nothing is paid without consideration; the party receiving the money had no right to demand it, and has no right to retain after receiving it, no matter how negligent the payor may have been, and he cannot acquire any right to keep the money except upon the following combination of facts: 1st, that the payee was not negligent; 2d, that the payor was lacking in due care; 3d, that upon faith of the payor's action the payee has changed his position, or would be in a worse position if

When the holder may keep the money.

[6] Merchants' National Bank *v.* Eagle National Bank, 101 Mass. 281.

the mistake were corrected than if the payor had refused to pay or to accept at the time of presentment.

(7) It must be borne in mind that we have been considering only cases where the drawee was really acting under a mistake and the drawer had not so conducted himself as to become liable upon the paper; for if the drawee knew the signature was forged, or if the drawer is liable and the drawee may therefore rightly charge him with the payment, the money cannot be recovered.

§ 465. **Transition Cases. — Special Circumstances.** — Fuller *v.* Smith[1] is a curious case. The plaintiffs, bankers, discounted for the defendants a bill purporting to be drawn by L. and accepted by N. The plaintiffs were N.'s bankers. The signatures of both L. and N. turned out to be forgeries. The plaintiffs were allowed to recover. A foot-note explains, what does not appear in the opinion, that the reason of this decision was that the plaintiffs did not *pay* the bill in their capacity as bankers for N., but only *discounted* it for the defendants in their general capacity as a banking house. This distinction was considered to prevent this case from conflicting with Smith *v.* Mercer.[2]

Distinction between discounting and paying for the acceptor.

In Goddard *v.* Merchants' Bank[3] the plaintiffs took up a forged draft for the honor of the supposed drawers, relying, in doing so, upon the statement made by the defendants' teller and notary that the defendants held a draft of the drawers named for collection, and that it had been dishonored. The plaintiffs did not at the time see the document, because it was locked up in the notary's safe and he was away, so that it could not be immediately got at. Instantly, when they did see it, they pronounced it a forgery. They were allowed to recover their payment, on the ground that it was induced by the incorrect

Unseen draft paid on representation. Money recovered. Dissent.

[1] § 465. Fuller *v.* Smith, Ryan & Mo. 49. [2] 6 Taunt. 76.

[3] 4 N. Y. 147. And although the forgery was discovered too late to give notice of protest, no such notice was necessary, for the defendants had the bill only for collection, and needed no recourse, and the payee who forged the check was liable without notice.

assertion of the defendants' agents. But Ruggles, J., delivered a strong dissenting opinion, in which he asserted that none of the cases went the length of allowing the payors to recover where they had been guilty of substantial neglect, and in his opinion it was great neglect to pay an unseen draft under the circumstances shown. Certainly this view of the case is not incapable of strong support. If the plaintiffs were willing to waive the privilege of using their own judgment on the question of the genuineness of their customer's signature, and to accept the judgment of a notary or teller of another bank, it is at least such an excessive want of ordinary precaution that the law might reasonably refuse to help them out of the loss very naturally consequent thereupon.

§ 466. **Cases holding the Modern Doctrine.** — The point in issue has sometimes been said to be that of negligence.[1] The drawee who has paid upon the forged signature is held to bear the loss, because he has been negligent in failing to recognize that the handwriting is not that of his customer. But it follows obviously that if the payee, holder, or presenter of the forged paper has himself been in default, if he has himself been guilty of a negligence *prior* to that of the banker, or if by any act of his own he has at all *contributed* to induce the banker's negligence, then he may lose his right to cast the loss upon the banker. The courts have shown a steadily increasing disposition to extend the application of this rule over the new conditions of fact which from time to time arise, until it can now rarely happen that the holder, payee, or presenter can escape the imputation of having been in some degree contributory towards the mistake. Without any actual change in the abstract doctrines of the law, which are clear, just, and simple enough, the gradual but sure tendency and effect of the decisions have been to put as heavy a burden of responsibility upon the payee as upon the drawee, contrary to the original custom. The following cases will show that the interesting question has now come to be, whether or not the payee has done his full duty, or if he has, and the negligence is with the

The question now is, Has the payee done his duty, or has he been damaged?

[1] § 466. Bank of Commerce *v* Union Bank, 3 N. Y. (Comst.) 230.

bank alone, whether the payee will be worse off by correcting the error than if payment had been refused.

(*a*) An early English case is that of Wilkinson *v.* Johnson.[2] The opinion, delivered in excellent shape by Chief Justice Abbott, puts this matter very clearly. A bill drawn on a London banking-house, bearing the names of several indorsers, was dishonored. The notary of the holders carried it to the London correspondents of one of the indorsers, and asked them to take it up for the honor of this indorser. They at once did so, and at the same time drew a pen through the subsequent indorsements. Shortly after, they discovered the whole paper to be a series of forgeries, and directly returned it to the holders, from whose notary they had received it. The whole took place within *business hours of one and the same day*. It was held that this case was to be distinguished from that of the failure of an acceptor or bank to recognize a customer's handwriting. The bankers, to whom the bill was presented by the notary, ought certainly to have known their correspondents' hand, and to have seen that their purported indorsement was a forgery. But it is not so much in the ordinary course of business to ask a correspondent to take up a bill for the honor of an indorser, as it is to present a bill to a drawee for acceptance, or, we may add, a check to a bank for payment. The very request implies the fact of the indorsement, and in a measure tends to induce less careful scrutiny. So, though both parties were in fault slightly, yet the fault of the notary *may* have led to, or contributed to, the fault of the bankers, who took up the bill at his request.

Correspondents of an indorser paying for his honor.

(*b*) In a later case arising in Ohio, at the trial in the lower court at *nisi prius*, evidence was introduced going to show the existence of a custom in the city for the cashier or teller of a bank, to whom a check drawn upon another bank was presented and payment or purchase requested thereon by an unknown bearer, to take some means to assure himself that all was right; and for the drawee bank, upon receiving a

Usage for bank to inquire as to checks upon another, and if it does not, it cannot retain the money against the drawee.

[2] 3 Barn. & Cr. 428.

check through another bank to assume that such inquiries had been made by such other bank, and so to pay or give credit for the check with a proportionately less degree of scrutiny. The jury found for the drawee bank, and, upon exception, the verdict was sustained. The court *in banc* referred to the evidence of the custom, and said that, if the bank receiving the check should fail to comply with this custom, and to exercise such care, it would obviously contribute, by its own laches and negligence, to the error of the drawee bank in supposing the check to be genuine; and therefore, being itself not free from blame, having in fact given rise to, or at least promoted, the subsequent mistake, it must be held to bear the loss, and reimburse the drawee. The language of the court is, "Where the negligence reaches beyond the holder and necessarily affects the drawee, and consists of an omission to exercise some precaution, either by the agreement of parties or the course of business devolved upon the holder, in relation to the genuineness of the paper, he cannot, in negligent disregard of this duty, retain the money received upon a forged instrument." [3]

Contributory negligence of holder.

(*c*) To enable a holder to retain money paid to him on forged paper, he must put the bank alone in the negligence, and be able to say that the mistake of the bank "cannot now be corrected without placing the holder in a worse position than though payment had been refused. If he cannot say this, and especially if the failure to detect the forgery can be traced to his own disregard of duty in negligently omitting some precaution he had undertaken to perform, he fails to establish a superior equity to the money, and cannot with good conscience retain it." [3] If both parties are innocent equally, or both negligent equally, or the holder chiefly negligent, the bank may recover.

(*d*) But the Supreme Court of Massachusetts has recently gone to an unprecedented length in relieving the banks from the burden put upon them by the old rule, and in a large proportion of the cases where checks are made payable to order has practically shifted that *onus* to the shoulders of the payee.

[3] Ellis & Morton *v.* Ohio Life Insurance & Trust Co., 4 Ohio St. 628.

The case is as follows.[4] The firm of E. D. & G. W. B. & Co., the defendants, sold some gold over their counter to a person who gave them in return a check payable to their order, signed W. D. B., drawn on the plaintiff bank, bearing date on the day of the transaction. The check was indorsed "E. D. & G. W. B. & Co.," and deposited by the payees that day in their bank for collection, and was on the following day passed through the clearing-house, and paid in ordinary course of business by the plaintiff bank. These transactions took place on September 21 and 22, 1869. On October 4, 1869, W. D. B., having received his checks from the bank in the monthly making up of his account, returned this check to the plaintiff bank and notified them that it was a forgery; and the bank on the same day notified the defendants. The court held that the plaintiffs were entitled to recover from the defendants the amount of the check, substantially upon the ground that the check, being payable to order, could not be given currency, or be put in shape for payment, without the indorsement of the defendants; that by this indorsement the defendants had done an act tending to give the instrument the character of genuineness, and to deter the plaintiff bank from making so careful an examination of the instrument on presentation as it might otherwise have done.

Mass. Thirteen days' delay.

The language of the opinion is substantially as follows. After explaining that the bank or drawee is presumed to have a special familiarity with the signature of the drawer, and that from this presumption arises "*what is often called an obligation or responsibility*," preventing the drawee from recovering back money paid on a forged signature, the court continues: "In the absence of actual fault or negligence on the part of the drawee, his constructive fault, in not knowing the signature of the drawer and detecting the forgery, will not preclude his recovery from one who has received the money with knowledge of the forgery, or who took the check, under circumstances of suspicion, without proper precautions, or whose conduct has been such as to mislead the drawee, or to induce

If payee was guilty of contributory negligence, or indorsed the paper, the drawee can recover.

[4] National Bank of North America *v.* Bangs, 106 Mass. 441.

him to pay the check without the usual scrutiny or other precautions against mistake or fraud. These exceptions are implied by the very terms in which the general rule is ordinarily stated. We are aware of no case in which the principle that the drawee is bound to know the signature of the drawer of a bill or check, which he undertakes to pay, has been held to be decisive in favor of a payee of a forged bill or check to which he has himself given credit by his indorsement.

"In the present case the check had not gone into circulation, and could not get into circulation until it was indorsed by the defendants. Their indorsement would certify to the public, that is, to every one who should take it, the genuineness of the drawer's signature. Without it the check could not properly be paid by the plaintiff. Their indorsement tended to divert the plaintiff from inquiry and scrutiny, as it gave to the check the appearance of a genuine transaction. Their names upon the check were apparently inconsistent with any suspicion of a forgery of the drawer's name."

The defendants acknowledged that on October 4, when first notified of the forgery, they had wholly forgotten from whom they received the check, whether from a party known to them or not. The court said, that, by the mere fact of the presentation of such a check to them in payment, they were put upon their inquiry as to its genuineness; that, having failed to satisfy themselves upon this point, they were not in a condition to put the loss upon the shoulders of another party. For all that appeared, they themselves had been guilty of the earlier laches.

(*e*) Unless the drawee's mistake as to signature of the drawer has caused the holder some loss, or the paper has been taken by a *bona fide* holder subsequently to acceptance by the drawee, the latter should not be held absolutely to a knowledge of his correspondent's signature.[5] The drawer himself may be deceived, and is not held unless loss has occurred by his mistake, or a *bona fide* holder has taken the paper on faith of his action.

[5] McKleroy *v.* Southern Bank of Kentucky, 14 La. An. 458; Chitty on Bills, 485.

(*f*) The holder of a check (C.) signed by A. had formerly received a check signed by the same party but with a different name. He did not mention this fact to the bank on presenting check C. and was held to repay the money in consequence of his neglect to impart this knowledge of suspicious circumstances, C. turning out to be a forgery.[6]

Holder's neglect to impart suspicious facts.

(*g*) A certificate of deposit issued by bank A. to D., who could not write, was brought to bank B. by E., who gave D.'s name and said he could not write. His mark was taken with all due solemnity and witnessing, and the certificate forwarded to bank A., which paid it, and E. got the money. D. soon after presented himself at A. and demanded his cash; upon this discovery, A. paid D. and sued B. Held, A. could recover, as it had a right to rely on B.'s identification of the person to whom it paid the money.[7]

Holder bank negligent in not requiring identification.

(*h*) In 1849 a statute was enacted in Pennsylvania under which the drawee bank may recover from the holders money paid upon forged checks.[8] Mere "want of care or negligence in paying a forged bill will not alone, since this act, preclude recovery."[9] As between the bank and the person receiving the money, the bank is not bound to know its depositor's signature as formerly. But if the bank is negligent, and the holder has innocently, before notice of the forgery, changed his condition on faith of the bank's action, the bank cannot recover; the statute was not intended to relieve the bank of the consequences of its own neglect.[10] But the right of the bank to recover does not depend on the question whether the holder can recover of the forger.[8]

Pa. statute.

In another Pennsylvania case a draft to the order of the

[6] Rouvant *v.* San Antonio National Bank, 63 Tex. 610.

[7] State National Bank *v.* Freedmen's Saving & Trust Co., 2 Dill. 11.

[8] Corn Exchange National Bank *v.* National Bank of the Republic, 78 Pa. St. 233; Tradesmen's National Bank *v.* Third National Bank, 66 Pa. St. 435; both payments through the clearing-house.

[9] Union National Bank *v.* Chambers, 9 Phil. 131.

[10] Commercial Exchange National Bank *v.* National Bank of Republic, 9 Phila. 133.

drawers came to the hands of bank B., which received the money from the drawee through the clearing-house. Two days after, the forgery was discovered, and the drawee bank by suit recovered.[11] The rule of the clearing-house, that errors should be adjusted and checks not good returned before one o'clock, was held to apply only to ascertaining that the account was overdrawn.[12]

Between Bank and Drawer, Forgery of Drawer's Signature.

§ 467. **The Old Rule.** — The effort has been made to have the writing up of the customer's bank-book, and returning it to him together with the checks, purporting to be vouchers, held to be equivalent to the rendition of an account stated, which, if not promptly rejected by the depositor as incorrect, is to be held binding upon him, so that he cannot afterward demand correction if a forged or altered check has been wrongly charged to him. Formerly the courts did not accept the doctrine, but declared that the depositor was under no obligation to examine the checks returned to him, and purporting to have been drawn by him; and that he was not concluded by his neglect to do so, and his consequent failure promptly to detect a false check.[1]

The old rule was, that drawer was under no obligation to examine his checks and accounts stated.

In criminal law it has been held that altering one's own signature to a paid check, and then insisting that it is a forgery, and demanding reimbursement from the bank, though a fraud on the bank, is not forgery.[2]

§ 468. — **When Drawer pronounces his Signature Good, or issues the Paper with a Forgery upon it.** — A signature that one has himself sent into the world he cannot deny, as if a forged signature is on a note at the time the maker issues it, the holder may recover of him.

So, if the drawee accepts a bill or check, the acceptance is a

[11] Levy *v.* Bank, 1 Binn. 27.

[12] Tradesmen's National Bank *v.* Third National Bank, 66 Pa. St. 435.

[1] § 467. Weisser *v.* Denison, 10 N. Y. 68; Manufacturers' National Bank *v.* Barnes, 65 Ill. 69.

[2] Brittain *v.* Bank of London, 3 F. & F. 465; 11 W. & R. 569.

warranty of the genuineness of the paper up to the time of acceptance as to any *bona fide* holder taking after the acceptance; but not as to the party presenting the paper to the drawee, for such person had it already, and did not take it on faith of the acceptance. Any person who pronounces his own signature to be good will be estopped to deny it as against one who has *bona fide* acted on the faith of his representation; as against one who buys[1] upon his assurance, or delays to enforce his rights at his request, thus allowing other parties to abscond or fail.[2] But if the mistake is discovered, and notice given before the holder is any the worse for it, it may be corrected.[3]

If the drawer knew, when he acknowledged the signature, that it was forged, his action will be held an adoption of it, and he will be bound as if he had signed actually.[4] Actual fraud or *mala fides* in the adverse party will prevent such adoption;[5] and if the party did not know the facts affecting his rights, he is not bound by the acknowledgment.[6] Paying similar former drafts knowing they were forgeries may estop the acceptor, whose name is forged, from denying his liability on a subsequent bill, as having adopted such acceptances.[7] So, if an acceptor knows that an indorsement is forged when he negotiates the paper, he is bound.[8]

It will sometimes happen that a bank, after it has made actual payment upon a check, will have some suspicion arise as to the genuineness of the drawer's signature, and will show him the check and ask him if it be good. In such case, if the drawer, in good faith and under the mistaken impression that

[1] § 468. Woodruff *v.* Munroe, 33 Md. 158; Greenfield Bank *v.* Crafts, 4 Allen, 447; Beeman *v.* Duck, 11 Mees. & W. 251; Dow *v.* Sperry, 29 Mo. 390.

[2] Hefner *v.* Dawson, 63 Ill. 403.

[3] Woodruff *v.* Munroe, 33 Md. 158.

[4] Hefner *v.* Vandolah, 62 Ill. 483; Wellington *v.* Jackson, 121 Mass. 157; Union Bank *v.* Middlebrook, 33 Conn. 100.

[5] McHugh *v.* County of Schuylkill, 67 Pa. St. 391.

[6] Gleason *v.* Henry, 71 Ill. 109.

[7] Barber *v.* Gingell, 3 Esp. 60; Cront *v.* De Wolf, 1 R. I. 393.

[8] Beeman *v.* Duck, 11 Mees. & W. 251.

the signature is in fact his own, answers that it is his, when in fact it is not, he is not concluded by his answer from afterwards showing that the signature is in fact a forgery. Odd as such cases may seem, they are not by any means of rare occurrence in the course of business. Imperfect sight, distracted attention, a very excellent simulation of the handwriting, have not unfrequently led to false statements in this respect. The cases are unanimous in declaring that the depositor is not estopped by his assertion.[9] The ground is, that he does no act which affects the position of the bank. The *deed of the bank* is perfect. *Its legal effects have all accrued.* The depositor, volunteering to try to answer honestly a question which concerns only such a completed transaction, is under no liability for a mistake. His answer is a gratuitous courtesy, rather than a legal admission. Concerning a matter not directly interesting to himself, he means to give as correct information as he can. But he by no means seeks to give currency or credit to the check, which is indeed now no longer a check, but a mere piece of documentary evidence.

Drawer, though acknowledging his signature, may recover, unless the bank is injured by his negligence.

This is the general rule. Exceptional cases may, of course, arise, which would be taken out of its operation. Thus, if the bank should intimate its suspicions, and say that if the check were not good, and that by being promptly assured of the fact it might be able to save itself in whole or in part from loss, then the drawer might well be held to make a thorough scrutiny of the signature, and be thereafter estopped by his acknowledgment of it as his own; especially if in real fact that acknowledgment caused the bank to abandon substantial means of saving itself harmless. But in such a case it would be essential that the bank should state to the supposed drawer at the time its doubts, and its hopes of saving itself. For even if these existed, and

Drawer estopped.

[9] Weisser *v.* Denison, 6 Seld. 68; Hall *v.* Huse, 10 Mass. 40 (a case of a promissory note); Salem Bank *v.* Gloucester Bank, 17 id. 1 (a case of bank bills; Barber *v.* Gingell, 3 Esp. 60; Pickard *v.* Sears, 6 Ad. & El. 469; Leach *v.* Buchanan, 4 Esp. 226.

the bank did not mention them, but to all appearance merely asked a question of curiosity or ordinary interest, the drawer would not be put under the especial and peculiar obligation which full information would lay upon him.

§ 469. **Drawer in Fault.** — F. had a book-keeper, K., who forged F.'s check for $2,500. As it exceeded F.'s deposit, the bank notified him and showed him the check; he said he had not signed it, but did not say it was a forgery, and, after seeing K., told the bank it was all right. Subsequently K. forged F.'s name for $1,700, and the bank paid it. Held, that F. had caused his own loss by ratifying K.'s former wrong, and retaining him in his service.[1]

§ 470. **Drawer's Negligence in leaving Check-book accessible does not relieve the Bank.** — A bank is not relieved from liability to the drawer for paying on a forgery of his name by showing that it was committed on a blank taken from the depositor's check-book that was left lying about the office; that the clerk was allowed to fill up checks, and introduced to the bank officials as a proper person to receive money on the depositor's check. In the absence of proof that the clerk had or was properly supposed by the bank to have authority to sign the depositor's name, the bank is liable for the payment.[1]

§ 471. **Ratification by Drawer's Conduct.** — A. gave B. money to deposit, which B. did in his own name, the bank knowing, however, who owned the fund. B. indorsed the certificate of deposit to A., but afterward abstracted it, crossed out the indorsement, and got the money. A. objected to B. and to the bank, but B. promised to give A. a mortgage as security, and on this promise A. let the matter run on for three years, treating the transaction as a loan to B. Held that A. could not recover of the bank after such treatment of the matter.[1]

When an agent deposits to his principal's credit money arising from a claim mentioned in a power of attorney, giving

[1] § 469. De Feriet *v.* Bank of America, 23 La. An. 310.
[1] § 470. Mackintosh *v.* Eliot National Bank, 123 Mass. 393.
[1] § 471. Dewar *v.* Bank, 115 Ill. 22.

him general power to collect, give receipts, apply, do generally, &c., and the agent draws the money on checks purporting to be signed by the principal and believed by the officers of the bank to be genuine, the bank is discharged, the checks are acquittances, though forged.

In this case the court said that, aside from any question of authority, ratification, or knowledge, money paid by the bank to the agent, which he delivered to his principal, or retained with her consent, or disposed of with her approval, would be a credit to the bank on the deposit account, unless thus to follow the fund would violate some peculiar equity.[2]

§ 472. **The Drawer must exercise Ordinary Diligence in Examination of Accounts and Vouchers.** — Where a depositor acquiesced in an account stated by silence for two years thereafter, and then sued the bank on the claim that some of the checks paid as his had been signed without authority, held that the burden was on him to impeach the checks.[1]

A depositor who knows checks paid by the bank and charged to him are forged, and fails to give notice to the bank, will be estopped. "If a party having an interest to prevent an act being done has full notice of its being done, and acquiesces in it, so as to induce a reasonable belief that he consents to it, and the position of others is altered by their giving credit to his sincerity, he has no more right to challenge the act to their prejudice than he would have had if it had been done by his previous license." [2]

Estoppel.

Lord Campbell's statement.

In Morgan's case [3] the United States Supreme Court said that not only would the law estop the depositor if he had actually discovered that checks charged to him were forgeries, and failed to notify the bank; but if the depositor was guilty of neglect in failing to make such reasonably careful and prudent examination as would lead to the discovery, he must bear

[2] City Bank of Macon *v.* Kent, 57 Ga. 283 (1886).

[1] § 472. American National Bank of Detroit *v.* Bushey, 45 Mich. 135 (1880).

[2] Carncross *v.* Lorimer, 3 Macq. 830.

[3] Leather Manufacturers' Bank *v.* Morgan, 117 U. S. 96.

the loss. And if the agent he appoints is negligent, it is imputable to him.

"*Of course, if the defendant's officers, before paying the altered checks, could by proper care and skill have detected the forgeries, then it cannot receive a credit for the amount of those checks, even if the depositor omitted all examination of his account. But if by such care and skill they could not have discovered the forgeries, then the only person unconnected with the forgeries who had the means of detecting them was Cooper himself.* He admits that by such an examination as that of March, 1881, (when, Berlin having stayed away from the office for a day, he compared his pass-book with the stubs of the check-book, and ascertained that a certain number of checks appearing on the stubs were not charged against him in his pass-book, and did not appear to have been returned by the bank, while others, which appeared on the pass-book to have been charged against and returned to him, did not appear, by the stub of the check-book, to have ever been drawn,) he could easily have discovered them on the balancings of October 7th, 1880, November 19th, 1880, and January 18th, 1881. If he had discovered that altered checks were embraced in the account, and failed to give due notice thereof to the bank, it could not be doubted that he would have been estopped to dispute the genuineness of the checks in the form in which they were paid.

"It seems to us, that if the case had been submitted to the jury, and they had found such negligence upon the part of the depositor as precluded him from disputing the correctness of the account rendered by the bank, the verdict could not have been set aside as wholly unsupported by the evidence. In their relations with depositors, banks are held, as they ought to be, to rigid responsibility. But the principles governing those relations ought not to be so extended as to invite or *encourage such negligence by depositors in the examination of their bank accounts as is inconsistent with the relations of the parties, or with those established rules and usages sanctioned by business men of ordinary prudence and sagacity, which are or ought to be known to depositors.*

"We must not be understood as holding that the examination by the depositor of his account must be so close and thorough as to exclude the possibility of any error whatever being overlooked by him. Nor do we mean to hold that *the depositor is wanting in proper care when he imposes upon some competent person the duty of making that examination, and of giving timely notice to the bank of objections to the account. If the examination is made by such an agent or clerk in good faith, and with ordinary diligence, and due notice given of any error in the account, the depositor discharges his duty to the bank. But where, as in this case, the agent commits the forgeries which misled the bank and injured the depositor, and therefore has an interest in concealing the facts, the principal occupies no better position than he would have done had no one been designated by him to make the required examination, — without at least showing that he exercised reasonable diligence in supervising the conduct of the agent while the latter was discharging the trust committed to him.* In the absence of such supervision, the mere designation of an agent to discharge a duty resting primarily upon the principal cannot be deemed the equivalent of performance by the latter. While no rule can be laid down that will cover every transaction between a bank and its depositor, it is sufficient to say that the latter's duty is discharged when he exercises such diligence as is required by the circumstances of the particular case, including the relations of the parties, and the established or known usages of banking business."

In the case of Hardy *v.* Chesapeake Bank,[4] fourteen checks were forged by Holmes, the confidential clerk of Hardy. It was the business of this clerk to keep Hardy's books, "to enter the checks in the bank-book, and to superintend the writing up and balancing the account with the bank, and to keep himself informed of the true state of the account." Five of the checks were returned to Hardy with the balance of July, 1873, the rest with that of October 6. Hardy discovered the forgery on October 10, and notified the bank. In a suit by him against the bank, the jury returned a verdict

[4] 51 Md. 585.

for Hardy for the first five checks only. He appealed, and the court held that the principle was universally maintained that the bank was bound to know the signature of the drawer. No title could pass by a forgery, and of itself the possession of forged paper paid by it gave the bank no claim against the person whose name was forged. But if Hardy knew the forgeries had been committed, or if he was negligent after the balance of July, and carelessly omitted to use means of information easily accessible that would have led to discovery, if, in other words, he would have been led to a knowledge of the facts by such diligence as men of ordinary prudence exercise in similar matters, then it must be found that the bank was misled into paying the nine later checks by Hardy's neglect, and he would be estopped as against the bank to deny Holmes's authority to draw them. The court lay great stress on the doctrine of estoppel, saying, however, that it "can have no application except the party invoking it can show that he has been induced to act or refrain from acting by the acts or conduct of the adverse party under circumstances that would naturally and rationally influence ordinary men. . . . Negligence, to create an estoppel, must be in the transaction itself and be the proximate cause of leading the third party into mistake, and also must be the neglect of some duty which is owing to such third party, or to the general public. . . . We think it not too much to say, that in a case like the present there is a duty owing from the customer to the bank to act with that ordinary diligence and care that prudent business men generally bestow in such cases, in the examination and comparison of the debts and credits contained in his bank or pass book in order to detect any errors or mistakes therein."

After a reasonable time, the presumption arises that an account rendered is correct. This results from the habit of business men to examine and scrutinize such accounts. But if the error is not discoverable by reasonable care, or there is no such appearance of things as to excite suspicion in a reasonable man, or if, for any reason, the party had no opportunity to examine the account by himself or by his agent, the presumption is repelled.

The knowledge of the agent of his own wrong was not the knowledge of the principal. The agent's knowledge is only imputed to the principal when the former is acting in the course of his employment. Otherwise the grossest injustice might be done in the name of law, and an innocent person held responsible for all sorts of felonies,[5] and even his own murder might become a suicide.

In Massachusetts this case arose. A check payable to order was fraudulently altered by the drawer's clerk, after having been signed by the drawer, by erasure of the payee's name, and was thereby made payable to bearer, and the amount was collected by the clerk from the bank. The bank on the first day of the following month wrote up the depositor's bank-book, and returned it to him with this check among the others. Another monthly writing up occurred, and then the depositor drew out the balance shown to be due to him. The checks were examined by the clerk, not by the depositor himself; no objection was suggested concerning this altered check. Twenty-three months afterward, the drawer, discovering the facts, sued the bank for the amount of the check. It was held that he was bound to use due diligence in discovering the alteration; also that he was affected by the knowledge of his agent, the clerk, to whom he entrusted the duty of examining the returned checks; also, as bearing on the question of ratification, that evidence that the bank had previously paid checks of this drawer, bearing evidence on their face of alterations in the name of the payee, was inadmissible.[6] A ruling, requested by the bank, was refused, to the effect that, if the depositor did not, after a reasonable opportunity for doing so, examine the checks which were returned to him as paid, and object to the payment of this altered one, he must be presumed to have ratified it.

The court said that the question of ratification was for the jury. Whether the circumstance known to the plaintiff called

[5] See Hardy's case, p. 781, and Welsh *v.* German American Bank, 73 N. Y. 424; Weisser *v.* Denison, 10 N. Y. 77; Star Fire Ins. Co. *v.* New Hampshire National Bank, 60 N. H. 442.

[6] Dana *v.* National Bank of the Republic, 132 Mass. 156.

for an examination that would have led to discovery of the forgery was a question for the jury. "The plaintiffs owed to the defendant the duty of exercising due diligence to give it information that the payment was unauthorized; and this included, not only due diligence in giving notice after knowledge of the forgery, *but also due diligence in discovering it. If the plaintiffs knew of the mistake, or if they had that notice of it which consists in the knowledge of facts which, by the exercise of due care and diligence will disclose it, they failed in their duty; and adoption of the check and ratification of the payment will be implied.* They cannot now require the defendant to correct a mistake to its injury, from which it might have protected itself but for the negligence of the plaintiffs. Whether the plaintiffs were required in the exercise of due diligence to read the monthly statements or to examine the checks, and how careful an examination they were bound to make, and what inferences are to be drawn, depend upon the nature and course of dealing between the parties, and the particular circumstances under which the statements and checks were delivered to them. There was evidence that the plaintiffs did examine the statements and checks so far as to see that the checks returned corresponded with the amounts in the stub of the check-book. Whether this was all the examination required we need not consider. The plaintiffs made that examination, and are affected with the knowledge it would give, though it was made by Piper. He was their agent for that purpose. . . .

Depositor held to due diligence in discovering forgery, and is responsible for his agent's negligence, to whom he intrusts the examination.

"If the examination made by Piper as agent for the plaintiffs, and the information which came to him within the scope of his agency, were sufficient to have given him notice of the forgery of the check of November 20, it does not lie in the mouth of the plaintiffs to say that he did not acquire that knowledge as their agent, so as to affect them with it. If such examination would have given them notice if made by an honest agent, they cannot affect ignorance because they were made by a dishonest agent, who had fraudulent knowledge of the fact."

§ 473. **Mere receipt of the Account, and Silence, does not conclude the Drawer. — Immediate Examination is not necessary, he is held only to Ordinary Diligence.** — The depositor is entitled to assume that his check, payable to order, will not be paid by the bank until it shall have assured itself that the necessary indorsements appearing thereon are genuine.[1]

Welsh's book-keeper had charge of his bank-books and of his produce. He made fictitious accounts of purchases, and got Welsh to sign checks for payment of the price, payable to the order of the customer from whom the alleged purchases were made. The book-keeper forged the customer's indorsement and got the money. Welsh did not discover the fraud for some months, but gave prompt notice when he did. It was held that neither the deception upon him, nor his receiving the bank-books and checks as vouchers, precluded him from recovering of the bank.[1]

The person whose name is forged is not obliged to examine immediately to detect the forgery; it is sufficient if he notifies the bank when he discovers the forgery.[2]

Drawer's duty.

The duty of the drawer is only to exercise ordinary care in examining his accounts, he is not required to carry on the examination in such a manner as necessarily to lead to discovery. If he examines the checks himself and is deceived, or if he has an agent who *bona fide* conducts a reasonably careful examination, and the skilfulness of the forgery eludes detection by ordinary care, the loss cannot be shifted upon the drawer.[3]

§ 474. **The Bank paying on Forged Indorsement is liable to the true Owner.** — If A. draws a check payable to B. and delivers it to B., and C. forges B.'s name and gets the money, B. can recover from the bank on the money counts if the amount has been charged to the drawer.[1] That constitutes an acceptance of the check, and the bank holds the money for the

[1] § 473. Welsh *v.* German American Bank, 73 N. Y. 424.

[2] First National Bank *v.* Tappan, 6 Kans. 456.

[3] Frank *v.* Chemical National Bank, 84 N. Y. 209.

[1] § 474. Millard *v.* National Bank of Republic, 3 McArthur, 54 (1878, D. C.).

true owner; if it pays to a wrongful holder, or any one not entitled to receive, it must repay.

When a check is paid on a forged indorsement, the payee may bring suit on it as though there had been no indorsement or payment; or if it had not been issued by the drawer, he may recover the amount from the bank.[2]

Where a check is drawn payable to the order of any actually existing person or corporation, if the order or indorsement of such payee is forged, payment by the bank is no acquittance. The depositor has directed payment to be made in a certain manner; a payment made otherwise than according to his directions is no discharge of the bank's obligations towards him. Neither has the holder, under a forged indorsement, any title to the paper, or any right to receive payment upon it.[3]

Check must be paid according to drawer's directions.

The law has been clearly laid down in an Ohio case to the following purport: The undertaking of the banker with his customers is to pay their checks or bills according to the law merchant. A check or bill, payable to order, is authority to the banker only to pay it to the payee, or to any person who becomes holder by a genuine indorsement. If there be a genuine indorsement in blank, it is authority thereafterward to pay to any person who seems to be the holder. The banker can charge his customer with no payments save those made as afore described, unless there be circumstances which amount to a direction from the customer to the banker to pay without reference to the genuineness of the indorsement, or circumstances equivalent to a subsequent admission by the customer of the genuineness of the indorsement, in reliance upon which the banker has been induced so to alter his position as to

[2] Indiana National Bank *v.* Holtsclaw, 98 Ind. 85 (1884); Seventh National Bank *v.* Cook, 73 Pa. St. 483; Dodge *v.* National Exchange Bank, 20 Ohio St. 246.

[3] Vanbibber *v.* Bank of Louisiana, 14 La. An. 481; Morgan *v.* Bank of State of New York, 1 Duer, 434; 11 N. Y. 404; Graves *v.* American Exchange Bank, 17 N. Y. 205; Coggill *v.* American Exchange Bank, 1 N. Y. 113; Talbot *v.* Bank of Rochester, 1 Hill, 295; Canal Bank *v.* Bank of Albany, id. 287; Story on Bills, § 451; Sharswood's note to Byles on Bills, p. *21.

preclude the customer from showing the indorsement to be forged.[4]

The clearest statement of the principle upon which this rule is based is to be found in a Louisiana case, substantially as follows: —

(*a*) When the bank has agreed to fulfil the drawer's instructions, the amount called for by the check becomes at once the money of the payee, who can hold the bank responsible for it. Thus, if a check be payable to the order of A., and B. obtains possession of it, fraudulently indorses it, presents it for payment, and obtains payment, then the bank by the act of paying agrees to pay the drawer's draft for that amount in favor of A.; but not having in fact done so, it may be held to refund the amount to A. "The bank, from the moment it undertakes to pay the check, holds the amount of the check as agent of the payee, and is responsible to the payee, as his agent, if it pays it upon a forged indorsement."[5]

(*b*) The following is a Pennsylvania case, also sustaining the same doctrine. A bank paid a check on which the indorsement of the payee was forged by the payee's clerk, and deducted the amount paid from the drawer's account, to which apparently the drawer made no objection. The payee having afterwards got possession of the check from the drawer, to whom it had been returned by the bank upon balancing the bank-book, presented it to the bank, and demanded payment. The bank refused payment, and the payee sued to recover. The verdict was for the payee. Upon appeal, the court said that, since the bank had retained the amount from the drawer's account, the case might come within the exception laid down toward the close of the opinion in Bank of Republic *v.* Millard.[6] "It is in fact an acceptance, and binds the bank as a certified check does." The court does not seem to have felt quite clear or positive about the law, but were resolved to sustain the

[4] Dodge *v.* National Exchange Bank, 20 Ohio St. 234, following Robarts *v.* Tucker, 16 Q. B. 560; Shaffer *v.* McKee, 19 Ohio St. 526.

[5] Vanbibber *v.* Bank of Louisiana, 14 La. An. 481; Dodge *v.* National Exchange Bank, 20 Ohio St. 234.

[6] 10 Wall. 152.

verdict, and consoled themselves with the reflection that "on the merits the case was for the plaintiff." [7]

But the case cited by the Pennsylvania court affords a very slender and dubious basis for the decision of that court, and directly controverts the position of the Louisiana and Ohio cases, *supra*. A check payable to the order of M. was paid to another person, on the faith of a forged indorsement. Afterward M. recovered possession of it, presented it, and demanded payment. This was refused, and M. brought suit in his own name against the bank. Mr. Justice Davis, having laid down the general doctrine that the bank can be held in a suit by the payee of a check only when it has accepted, or in some way undertaken to pay the check, proceeded as follows: "The defendant did not accept the check for the plaintiff, nor promise him to pay it, but, on the contrary, refused to do so. If it were true, as the evidence tended to show, that the bank, before the check came to the plaintiff's hands, paid it on a forged indorsement of his signature to a person not authorized to receive the money, it does not follow that the bank promised the plaintiff to pay the money again to him, on the presentation of the check by him for payment. It may be, if it could be shown that the bank had charged the check on its books against the drawer, and settled with him on that basis, that the plaintiff could recover on the count for money had and received, on the ground that the rule of *æquo et bono* would be applicable, as the bank, having assented to the order, and communicated its assent to the paymaster, would be considered as holding the money thus appropriated for the plaintiff's use, and therefore under an implied promise to pay it on demand."

(*c*) Against the bank's liability the argument is that the bank cannot be expected to know the signature of any random member of the community in whose favor a depositor may have occasion to draw a check payable to order.[9] This is most

[7] Seventh National Bank *v.* Cook, 73 Pa. St. 483.

[8] National Bank of Republic *v.* Millard, 10 Wall. 152.

[9] Thus it has been held in England that a bank instructed by its customer to accept bills of exchange which a correspondent of the cus-

true; but the answer is that, whenever a check is made payable to order, the bank has an unquestionable right to assure itself of the genuineness of the order before making the payment. Nor could the bank be compelled to take any trouble for this purpose. It is universal custom for the bank to require the holder of such a check to bring satisfactory evidence upon this point.[10]

Payment to another of same name.

The case of Graves *v.* The American Exchange Bank[11] certainly carries the liability of the bank to an extreme, and it may be to an excessive point. The rule is there laid down, that if a check be made payable to a person, and another person of precisely the same name, or initials, so far as these are written out in the check, comes wrongfully or accidentally into possession of the same, indorses it, and obtains the money on it from the bank, still the bank is liable to make good the amount to the drawer. The logical sequence which leads to this goal is clear enough. The drawer has ordered payment to be made to the order of one person, and it has been made to the order of another; consequently, payment has not been made according to the drawer's direction, and the bank is not discharged *pro tanto*. The indorsement is a forgery. This is plain reasoning. Yet it would seem that the bank ought to be protected in such a case. A reasonable limit should be set to its liability. It cannot be supposed to have such cognizance of the private affairs of each depositor as to know in favor of what individuals he is going to draw his several checks. This is clearly impossible. The depositor orders payment to be made to one A. B. An A. B. presents the order and indorses it; the bank knows him to be A. B., or obliges him to prove himself to be A. B., and then pays him. Without the gift of divination, what more can they do? They have used all the means of identification which the drawer has placed at their

tomer would draw against certain bills of lading, is not bound to ascertain the genuineness of the bills of lading before acceptance. Woods *v.* Thiedermann, 1 H. & C. 478.

[10] Robarts *v.* Tucker, 16 Q. B. 560, per Maule, J., at p. 578.

[11] 17 N. Y. 205.

disposal, and if these have only led them into error, it is certainly rather his fault than theirs. He gives them nothing but a name to guide them in selecting the payee from the various members of the community: they do all that can be done with this sole means of distinction. If the name is not enough, but should have been supplemented with descriptive language, setting forth the true payee's profession, abode, place of business, &c., the drawer should have known this necessity and provided for it. If he depends upon the name alone, should he not be held to take the risk of its sufficiency as a sole means of identification? He had some degree of personal knowledge of the payee, and the bank very probably had not one particle. It does its best with the light it has. The drawer has not done his best by the light he had. Clearly justice demands that the drawer should suffer in case of error induced by such a state of affairs. But though the propriety of the ruling may be criticised, it must be admitted that it lays down the only adjudicated law in the premises, except a remark made in an old case in New Hampshire.[12] The only English authority is to the same effect. It is to be found in the case of Mead *v.* Young,[13] which was cited as an authority in Graves *v.* American Exchange Bank, and which appears fully to support that decision. It may be worth noticing, that in the American case Judge Roosevelt dissented. The technical rule of law declaring the indorsement a forgery is too strong for the principles of justice.

A pension agent sent a check addressed to H. and payable to him, but to *the wrong post-office*, whereby another person of the same name received the check, forged the indorsement, and got the money. H. recovered of the bank; it had accepted the check, and from that moment held the money for the true payee.[14]

Where a bank pays to another whose name is pronounced like that of the payee, but differently spelled, whether it was negligent is a question of fact on all the circumstances.[15]

[12] Foster *v.* Shattuck, 2 N. H. 446.

[13] 4 T. R. 28.

[14] Indiana National Bank *v.* Holtsclaw, 98 Ind. 85.

[15] White *v.* Springfield Institute, 134 Mass. 232.

This is the true question. It will not do to say the bank has not paid to the person to whom the drawer ordered payment, therefore it is liable; the question is, whose fault is it that a mistake has been made. The bank is only bound to the exercise of ordinary care in obeying the drawer's instructions; if it does this and loss follows, the depositor must bear it, just as if he had been doing the work himself.

(*d*) **Proceeds of Forged Checks.** — If, before the title to a check has passed to any other person than the drawer, it be dishonestly or fraudulently obtained from him, and the money collected upon it through a forged indorsement, even though the party who finally actually collects the money is an innocent holder for value, the drawer may maintain his action to recover the amount from the party so having collected the money.[16] Nor does it affect the drawer's right to recover that his bank has been guilty of such laches in notifying the forgery to the innocent receiver of the money as to have lost any right it might otherwise have had to recover from that receiver.[17]

Drawer's right.

(*e*) Two Louisiana cases[18] are quoted by some writers as sustaining the broad proposition that a bank is not required to pay again merely because of a forged indorsement on the paper it has cashed; that it is obliged to know that the signatures of the drawer and presenter are genuine, but is not required to know intermediate signatures, nor "can it properly refuse payment until assured that these are correct." This comes of citing cases by their head-notes without comparing them with the language of the opinions. What the cases really decide is, that if the drawer increases the risk of the bank, and throws upon the bank the responsibility which he ought to bear himself, the bank is not liable to the drawer, though it would be to any real payee whose name was forged. As deciding what is the drawer's duty and what sort of neglect

Real point is, that, if the loss is due to previous neglect of drawer, *he* cannot hold the bank.

[16] Talbot *v.* Bank of Rochester, 1 Hill, 295.

[17] Ibid.

[18] Levy *v.* Bank of America, 24 La. An. 220 (1872); Smith *v.* Mechanics' Bank, 6 La. An. 610 (1857).

on his part will prevent his holding the bank, the cases are interesting, and we give them briefly.

In Smith *v.* Mechanics & Traders' Bank, a broker bought a bill from A. purporting to have been accepted by Payne & Harrison, and gave A. a check payable to the order of Payne & Harrison, so that A. would have to go to them to get their indorsement, thus guarding against forgery in the acceptance. The fact was, that the acceptance was forged, and that A. forged the indorsement of Payne & Harrison, and drew the money. Held, that Payne & Harrison could undoubtedly recover from the bank if they had any interest in the check, but that the broker could not make the bank pay again, for he was guilty of the earlier neglect in taking the bill without inquiry, and in giving A. a check payable to the order of a person whose signature was not in the bank.

Slidell dissented, on the ground that the depositor ordered the bank to pay to the order of Payne & Harrison, and that the bank had not done so. The bank certainly was guilty of great neglect; it paid on an indorsement not even purporting to be correct, for it was written Payne & Harrin.

Levy *v.* Bank of America was a very similar case, and put on precisely the same ground. In each case the instrument bought by the check was a forgery, and the purchasers issued their checks to unknown persons, but in the name of the payees of the forged instruments, for the acknowledged purpose of throwing upon the bank the responsibility of paying the right party, and saving themselves the trouble of inquiry.

The court thought the drawers of the checks could not be allowed to throw upon the bank by such manœuvre the losses brought upon them by their own neglect, and said that the cases cited in opposition came under the general rule that banks pay checks to order at their own risk, *when their customers in drawing the checks have done nothing to create or increase that risk, as in these cases.*

(*f*) The United States Supreme Court[19] denies the right of the true owner of a check to recover of the bank unless the

[19] National Bank of Republic *v.* Millard, 10 Wall. 102; First National Bank of Washington *v.* Whitman, 94 U. S. 343 (1876).

check had been accepted, holding that neither a settlement between the bank and the drawer allowing for the check paid on a forged indorsement, nor the payment to the wrong party, constituted an acceptance of the check, and that the right of the true owner to sue the bank could not be based on such facts. In Bank *v.* Millard, the court said: "It may be that if the bank has charged the amount of a check to the drawer, and settled with him on that basis, the plaintiff could recover." In Bank *v.* Whitman, the court remarked that it was "difficult to construe a payment as an acceptance under any circumstances," and held that at any rate a payment by *mistake*, and charged to the drawer in a settlement, as in case of payment on a forged indorsement, could not let in the holder to sue the bank. The bank supposed that it had paid the check, but this was an error.

§ 475. **English Statute Law.** — 16 & 17 Vict. c. 59, § 19, provides that, if a check purports to be signed by the payee or any person to whose order it may be drawn, it is sufficient authority to the drawee to pay the amount. The bank will not be obliged to prove any indorsement. An indorsement "per procuration," or "as agent," is within the statute, as purporting to be the signature of the proper party.[1]

English cases not good here.

English cases concerning checks payable to order, and upon which the payee's signature has been forged, are not capable of being used as precedents in the United States. The law governing this part of the general subject of checks is in England matter of statute. Originally, Parliament enacted that all checks should be drawn payable "to bearer," or "to A. or bearer." An instrument, in form a check, but drawn payable to order, was regarded as an inland bill of exchange, and had to be stamped as such. It was only as the great use of checks in increasing the business facilities of the country became by degrees more fully appreciated, that the abandonment of this restrictive law was accomplished. It is by a very recent act of Parliament that

[1] § 475. Charles *v.* Blackwell, 1 Com. P. D. 548, aff. 2 id. 151. See Ogden *v.* Benas, Law R. 9 Com. P. C. 513. The law does not protect any one else than the drawee.

checks drawn payable to order have been legalized in their proper character as checks rather than inland bills.[2] But the same act has a further provision, exempting the banker from liability if the original or any subsequent indorsement be forged.[3] This causes the effect of the law as a whole to be rather slight. A check payable to order, where the banker is under no liability if he pays on a forgery of the order, is only a very small degree better than a check payable to bearer. The practical advantage of the rule must depend wholly upon the conscientiousness and assiduity of the banker; and where no legal punishment for neglect, however gross, short of positive bad faith, exists, there is likely always to be serious danger of its occurrence.

§ 476. **Money Paid on a Forged Indorsement** may be recovered at any time that the forgery is discovered, whether the holder has lost by the delay or not, except when the drawer has made himself liable on the paper, or the holder took on faith of a certification. Generally, a bank paying money on a forged indorsement may recover it from the holder, for neither acceptance nor payment admits any indorsement.[1] "Money paid by one party to another through a mutual mistake of facts, *in respect to which both were equally bound to inquire*, may be recovered back."[1] But if the holder could himself recover of the drawer, as where the latter issued the paper with the forged signature on it, the bank could recover of the drawer, and therefore has no need to sue the holder.[2]

(*a*) It seems that, if the check should be drawn payable to order, and the name of the payee should be indorsed *by the drawer himself*, then the bank would not be able to collect from the party to whom it had made payment. For the payee is a stranger to the transaction, and his indorsement is not necessary in order to pass title in the paper; and the bank,

[2] 16 & 17 Vict. c. 59. See also Hare *v.* Copland, 13 Ir. C. L. 426.

[3] 16 & 17 Vict. c. 59, § 19, expressly excepted from repeal in 33 & 34 Vict. c. 99.

[1] § 476. Canal Bank *v.* Bank of Albany, 1 Hill, 287; White *v.* Continental National Bank, 64 N. Y. 320.

[2] Hortsman *v.* Henshaw, 11 How. 177.

having paid under such circumstances, is entitled to charge the amount to the drawer, or, in the absence of sufficient funds of the drawer, may have an action against him.[3]

(*b*) In the regular course of business the N. Bank took a check drawn on the C. Bank. The latter paid it ($19,000). The check was dated November 9, 1874. December 3, the C. returned it to the drawer. March 23, 1876, the drawer notified C. that the payee's name had been forged, sued C., and recovered the amount withheld by it on account of the check. No measures to test the genuineness of the signature were taken by C. or by the drawer until March 23, 1876. The depositor in the mean time had become insolvent, and the position of the N. Bank had therefore been altered to its injury. It was nevertheless held that the C. Bank was not bound to ascertain the genuineness of the indorsement before paying the check, *and was not estopped by the delay;* that the N. was liable for the amount of the check with simple interest from the date of payment, but not for the costs of the drawer's suit against C. Evidence of a usage among banks in the city of the C. Bank, making it the duty of a bank to examine an indorsement and satisfy itself of its genuineness, was excluded.[4]

New York. Indorsement forged. Bank may recover, though the holder has been prejudiced by the delay in discovery of the forgery.

In questions arising between the bank and the person to whom the bank has made payment, the rule is exceedingly clear. Of course, if the bank pays the forger, or any person cognizant of the forgery, it would be entitled to recover back from him if it should have opportunity.[5] But the rule was laid down in the case of Canal Bank *v.* Bank of Albany,[6] that acceptance and payment, or either, concludes the drawees as against the payees only as to the genuineness of the draw-

[3] Coggill *v.* American Exchange Bank, 1 N. Y. 113; and see Meacher *v.* Fort, 3 Hill, (S. C.) 227.

[4] Corn Exchange Bank *v.* Nassau Bank, 91 N. Y. 74.

[5] Canal Bank *v.* Bank of Albany, 1 Hill, 287; Talbot *v.* Bank of Rochester, ib. 295; Coggill *v.* American Exchange Bank, 1 N. Y. 113; Dick *v.* Leverick, 11 La. 573; Smith *v.* Chester, 1 T. R. 654.

[6] 1 Hill, 287.

er's signature. If anywhere in the chain of indorsements to order there is a forgery, the bank may recover, no matter how long a time has elapsed since payment, provided it acts with due promptitude upon discovery. The court would not allow the rigid rule of Cocks *v.* Masterman [7] to govern in these cases. The reason is, that since title to the paper made or indorsed as payable to the order of any person can only be passed by the signature of that person, therefore, if the genuine signature be lacking, the title has not passed. The bank has paid under a mistake of fact to a person whom it believes to have the title, but who has it not. There is practical sense at least in the rule; for, if a bank having a check presented for payment, which has been transferred by a long series of indorsements, is to be obliged to examine into the genuineness of every one of them, it is a very grave burden. Of course it must be liable to the drawer if it pay on a forgery. But it may well be allowed to place confidence in the presenter, and to consider that he in presenting it warrants the accuracy of his title to it, acquired through the indorsements. Then, if the bank knows him to be responsible, it may at once pay him the amount, fairly expecting that, if there prove to be any irregularity, so that it is obliged to reimburse the amount to the drawer, it can save itself from the loss by recourse to the person at whose request, and to whom, it made the erroneous payment. Banks often require the presenter himself to indorse, even though the prior indorsements are in blank, for the purpose of being able to hold him as an indorser.

It is held that such an indorsement is an assurance of the genuineness of the paper in every respect, except only as to the signature of the drawer.[8]

(*c*) If a check on which an indorsement is forged be certified, the bank must pay it to a *bona fide* holder,[9] who took after the certification; "he who confides in the deceiver must suffer rather than a stranger."

[7] 9 Barn. & Cr. 92.

[8] Harris *v.* Bradley, 7 Yerg. 310; Jones *v.* Ryde, 5 Taunt. 488; Wilkinson *v.* Johnson, 3 Barn. & Cr. 428.

[9] Hagen *v.* Bowery National Bank, 64 Barb. 197 (1872).

§ 477. **Transfer warrants Genuineness of Paper.** — Whatever signature or indorsement is upon an instrument when issued by the drawer or maker will be deemed good against him in the hands of a *bona fide* holder. His delivery of the paper affirms its correctness, and if the name be forged the amount paid on the bill may be recovered by the drawee from the drawer.[1]

Any transferrer of negotiable paper by delivery, or by indorsement and delivery, like every other vendor of personal property, warrants his title, and that it is what it purports to be; and on this ground a bank paying upon a forged indorsement may recover from the party from whom it received the paper.[2] The very assertion of ownership is of itself a warranty of genuineness.

An indorsement warrants the genuineness of all prior signatures,[3] as well the indorsement of a bank paying a check as any other. When a clerk indorses a check without authority, the bank collecting the check from the drawee guarantees the genuineness of the indorsement, and the drawee may recover of the said collecting bank.[4]

Transfer guarantees indorsement.

§ 478. **Forged Certification of Check.** — It has been held in New York that the recognition by a bank teller of a certification of a check drawn on the bank, such certification purporting to have been made by him, may thereafter estop the bank from denying the genuineness of the certification. It makes no difference, say the court, whether the teller writes "Timpson, Teller," or

Adoption of a certification equal to the original act.

[1] § 477. Hortsman *v.* Henshaw, 11 How. 177; Coggill *v.* American Exchange Bank, 1 N. Y. 113.

[2] National Bank *v.* Bangs, 106 Mass. 445; Burgess *v.* Northern Bank of Kentucky, 4 Bush, 600; MacGregor *v.* Rhodes, 6 El. & B. 266; State Bank *v.* Fearing, 16 Pick. 533; White *v.* Continental National Bank, 64 N. Y. 320.

[3] Star Fire Ins. Co. *v.* New Hampshire National Bank, 60 N. H. 442; Turnbull *v.* Bowyer, 40 N. Y. 456; Thrall *v.* Newell, 19 Vt. 202; Aldrich *v.* Jackson, 5 R. I. 218; State Bank *v.* Fearing, 16 Pick. 533; Merriam *v.* Wolcott, 3 Allen, 258; City Bank *v.* First National Bank, 45 Tex. 203; Lobdell *v.* Baker, 1 Met. 193.

[4] Central National Bank *v.* North River National Bank, 44 Hun, 115 (March, 1887).

whether he states to the inquirer that the words, "Timpson, Teller," already written, are genuine. The facts showed that a man purchased certain gold checks, and gave in payment a check purporting to be certified. The sellers of the gold immediately sent their clerk with the check to inquire if the certification were genuine; he quickly returned with the statement from the bank officer that it was. In fact, however, as was subsequently discovered, it was a forgery. The Court of Appeals sustained the verdict of a jury, which cast the loss upon the bank. The court held that the bank was estopped, by the declaration of its officer, to deny the genuineness. It made no difference that the brokers had taken no steps in consequence of the information; it was sufficient that they had refrained from taking steps which they might have taken had the reply of the bank officer been other than it was. It was true that they had delivered the gold checks to the purchaser, and he had left the office before the return of the clerk; but he had left only a very short time before the return, and the brokers might still have been able to stop payment of their gold checks, or to arrest the purchaser or some accomplice. It is impossible to say certainly what they might have done, or with what actual results; but it is sufficient to establish the estoppel that they lost the possibility of doing anything.[1]

Fraudulent Alteration after Signature.

§ 479. **As between paying Bank and Party receiving Money.** — The bank which pays to any person the amount of a check, fraudulently altered after signature, may recover back from such person the amount so paid by it.[1] Where a bank acts as agent in collecting paper that turns out to be raised, and it has paid over the money to its principal, suit lies

Bank may recover money paid on a raised check, but agent bank not liable after remitting.

[1] § 478. Continental National Bank *v.* National Bank of the Commonwealth, 50 N. Y. 575. And to the point of estoppel, see Casco Bank *v.* Keene, 53 Maine, 103; Knights *v.* Wiffin, Law Rep. 5 Q. B. 660.

[1] § 479. Merchants' Bank of New York *v.* Exchange Bank of New Orleans, 16 La. 457; and see National Bank of Commerce *v.* National Mechanics' Banking Association, 55 N. Y. 211.

against the principal, and not against the agent bank, by the party who has mispaid.[2] Mere negligence in paying money does not prevent recovery if the receiver has not been misled or prejudiced by the mistake. This rule is not everywhere held to apply to the case of a drawee paying on a forgery of the drawer's signature, but does apply to the payment of a raised check; especially when the person receiving the money indorsed the check, that being a warranty of it. In such case the bank can recover the money, there being nothing in the circumstances to work an estoppel.[3]

Negligence will not prevent recovery from one who has not altered his position.

§ 480. **As between Bank and Drawer.** — The rule requiring the bank to know the customer's handwriting was always confined to requiring a knowledge of his signature.[1] Neither any rule of law nor the ordinary course of business renders it a matter of suspicion that the body of the check or bill is not written in the handwriting of the maker or drawer. Nevertheless, a false or fraudulent alteration in a material particular, made in the body of the check or bill after signature, constitutes a forged instrument just as much as the simulating the signature itself. By such alteration the instrument is vitiated, even in the hands of a *bona fide* holder for value, although it might not be possible to discover the change even by a careful scrutiny.[2] Of course it follows, as between the bank and the depositor, that a payment by the bank is the

Forgery in body of check, as between bank and drawer, is bank's loss, unless caused by drawer's negligence.

[2] National Park Bank *v.* Seaboard Bank, 44 Hun, 49 (March, 1887).

[3] City Bank of Houston *v.* First National Bank, 45 Tex. 203.

[1] § 480. Merchants' Bank of New York *v.* Exchange Bank of New Orleans, 16 La. 457; Bank of Commerce *v.* Union Bank, 3 N. Y. 230; Marine National Bank *v.* National City Bank, 59 N. Y. 71; Weisser *v.* Denison, 10 N. Y. 68; Canal Bank *v.* Bank of Albany, 1 Hill, 287; National Bank of Commerce *v.* National Mechanics' Banking Association, 55 N. Y. 211; Bank of the United States *v.* Bank of Georgia, 10 Wheat. 333, at p. 355; Jones *v.* Ryde, 5 Taunt. 488; Bruce *v.* Bruce, id. 495; Hall *v.* Fuller, 5 Barn. & Cr. 750.

[2] Wade *v.* Withington, 1 Allen, 561; Mahaiwe Bank *v.* Douglass, 31 Conn. 170; Belknap *v.* National Bank of North America, 100 Mass. 376.

loss of the bank; and such is the unquestionable rule,[3] except in those instances wherein the negligence or laches of the drawer of the check has laid the foundation for the error of the bank. If by any act of negligence upon his part, as by so carelessly writing the check as to render it easily open to material alteration without leaving evident traces for detection, the customer has furnished the opportunity for the fraud which has deceived the bank, then he must suffer the just consequence of his carelessness by bearing the loss himself.[4]

An old and leading case upon this point, well illustrating the duty of the drawer, is that of Young *v.* Grote,[5] which was as follows. A depositor, going away from home, left with his wife several checks which he had signed in blank, and which she was to fill up according to her needs. She filled up one for fifty-two pounds two shillings; but she began the word fifty with a small letter, and in the middle of a blank line; in writing the marginal figures, likewise, she left a considerable space between the mark £ and the figures 52. She gave the check in this form to her husband's clerk to get the money upon it. He inserted the words "three hundred" before the word "fifty" and the figure 3 before the figures 52, and then presented it and drew 352 pounds upon it. Here, of course, there were no perceptible marks indicating the alteration which had been made, and there were none such, because the check had been so carelessly written that the forgery was made the simplest matter in the world. Upon this ground, the court held that the loss must rest with the drawer. Only

[3] Belknap *v.* National Bank of North America, 100 Mass. 376; Sewall *v.* Boston Water Power Co., 4 Allen, 277.

[4] Young *v.* Grote, 4 Bing. 253; 12 Moore, 484; Orr *v.* Union Bank of Scotland, 1 Macq. H. L. C. 513; Bellamy *v.* Majoribanks, 21 L. J. Exch. 73; Hall *v.* Fuller, 5 Barn. & Cr. 750; Coles *v.* Bank of England, 10 Ad. & El. 449; Bank of Ireland *v.* Trustees, 5 H. L. C. 410; Grant *v.* Vaughan, 3 Burr. 1525; Johnson *v.* Windle, 3 Bing. New R. 225; Coggill *v.* American Exchange Bank, 1 N. Y. 113; Mahaiwe Bank *v.* Douglass, 31 Conn. 170; Wade *v.* Withington, 1 Allen, 561; Belknap *v.* Bank of North America, 100 Mass. 376; Byles on Bills, p. 24; Story on Promissory Notes, § 490, note; Grant on Bankers and Banking, pp. 12, 17 *et seq.*

[5] 4 Bing. 253; and see also Zimmerman *v.* Rote, 75 Pa. St. 188.

one remark may be made by way of criticising this case. It does not appear that the clerk in making his additions attempted to liken his handwriting to that of the wife. It is probable, therefore, that there were two different handwritings in the writing of the sum. This point was not adverted to at the trial of the cause, or at least is not mentioned in the report. But Mr. Grant, in commenting on the case, inclines to think that, if the body of the check had been in the handwriting of the drawer, which the bank was bound to know, then the insertion of words in another handwriting should have put the bank on inquiry. He is content, however, with a ruling which allows a diversity of hands not to be a point of suspicion, where neither of them is the hand of the drawer.[6]

But the mere fact that a person has so carelessly kept his check-book that another has obtained access to it, and has filled out one of his checks (forging his name thereto), does not constitute such negligence on his part as to justify the banker who has paid this check in charging the customer with the amount.[7]

The case of Belknap *v.* Bank of North America[8] establishes a just and important limit upon the liability of the drawer. The depositor, who had his checks lithographed for his own use with his name upon the margin, signed the checks in blank, and gave them to his book-keeper to ascertain and fill in the proper amounts. The book-keeper made up the accounts with certain parties, ascertained the amounts due them, made memoranda thereof, and gave the blank checks and the memoranda to an assistant clerk, recently engaged, to fill them up. This assistant filled them up correctly, and returned them to the book-keeper, who enclosed them in envelopes, which he addressed and delivered to this same assistant to carry to the post-office. Subsequent circumstances indicated that the assistant opened two of the envelopes and abstracted the checks. The checks had been written to "A.

[6] Grant on Bankers and Banking, pp. 17, 18.

[7] Bank of Ireland *v.* Trustees, &c., 5 H. L. Cas. 410.

[8] 100 Mass. 376.

or order," and to "B. or order." The thief drew a line through the words "or order" on each check, wrote above them the words "or bearer," and collected the money from the bank. The court said that they could not assume that it was careless on the part of the drawer to send the sealed letters to the post-office by a clerk who knew their contents, for the clerk could not obtain access to them except by committing a crime. The checks were not intrusted to him, as in the cases of Putnam *v.* Sullivan[9] and Young *v.* Grote.[10] The case was simply a payment by the bank made upon forged and vitiated paper; and it ought not to be submitted to the jury upon the question of the diligence or fault of the bank.

It is not negligence in the bank to pay the check before receiving notice from the depositor that it has been drawn. So simple a rule would seem hardly to require to be judicially affirmed; but in a Louisiana case, a party having attempted to show evidence of a custom on the part of the drawer to notify the bank, the court said that the testimony introduced to show this usage was insufficient to show it to be so universal or so general as to have any binding force. In the absence of usage, the law did not require the bank to suspend payment until advised of the drawing.[11]

Generally, if the drawer of the check has taken such precautions against fraudulent alteration as have now become customary and proper, a material alteration will be almost sure to betray itself to any reasonably careful scrutiny; so that the burden of detection laid upon the bank is not often unduly severe. Still, the rule is an imperative one. It is not only because the bank ought to have made the discovery, and has not done so, that it is held liable; but because it has paid and so treated as valid a paper which is absolutely vitiated and void. The greater or less measure of difficulty incident to detecting the fraud does not, therefore, enter into the ques-

[9] 4 Mass. 45. [10] 4 Bing. 253.

[11] Merchants' Bank of New York *v.* Exchange Bank of New Orleans, 16 La. 457.

tion at all;[12] or, at least, only indirectly, as bearing upon the question of the drawer's sufficient caution in preparing the instrument.

Though the foregoing would seem to be the true principle upon which the liability of the bank is based, yet the matter of the negligence of the bank is occasionally considered. "The greater negligence in a case of this kind," it has been said, "is chargeable on the party who received the bill from the perpetrator of the forgery."[13]

If a clerk, in writing the body of a check, write it so improperly or carelessly as to render alteration an easy matter, and such alteration is subsequently made, and the loss is cast by the bank upon the drawers by reason of the negligent manner of the writing of the check, it has been held that the drawers (who signed before the alteration) cannot hold the clerk liable to reimburse to them the loss, by reason of their own culpability in signing the check in such an improper form.[14]

§ 481. **Alteration of Certified Check after Certification.** — The same rule has been extended to apply to checks altered after they have been certified. The reason is less strong, yet it seems to be the law that the bank is not bound to an accurate knowledge of its own obligation. Therefore, if a bank officer certifies a check, and it is thereafterward and before presentment for payment altered so as to call for a larger sum, and the bank afterward, through mistake, pays the larger sum, it may recover back from the payee the difference between the original and the increased sums. Some English authorities would seem to entitle the bank to recover back the whole sum; for the alteration in the check in a material part viti-

[12] Wade *v.* Withington, 1 Allen, 561; Mahaiwe Bank *v.* Douglass, 31 Conn. 170; Hall *v.* Fuller, 5 Barn. & Cr. 750; Robarts *v.* Tucker, 16 Q. B. 560. Practically to the same effect are Graves *v.* American Exchange Bank, 17 N. Y. 208; Mead *v.* Young, 4 T. R. 28, wherein the discovery of the forgery would have been very difficult indeed, and no reason for suspecting it was apparent or existed.

[13] Bank of Commerce *v.* Union Bank, 3 N. Y. 230; and see Merchants' Bank of New York *v.* Exchange Bank of New Orleans, 16 La. 457.

[14] Whitmore *v.* Wilks, 3 C. & P. 364.

ates it altogether and makes it a void instrument, so that any payment at all upon it might be considered unlawful.[1] But the precise question has arisen and been disposed of in New York, in a case substantially as follows.[2]

(*a*) On February 15, V. & Co. gave to G. their check for $56.75, which G. had duly certified by the bank on which it was drawn; after certification it was fraudulently altered so as to bear date a day later, and to read for a much larger amount. G. then deposited it in his bank, and obtained credit for the false amount. The check went through the clearing-house, and was duly allowed by the bank on which it was drawn. It was not until the first of the following month that, in ordinary course of business, V. & Co. discovered the forgery, and notice was immediately given. Suit was brought by the bank on which the check had been drawn against the bank which had presented it at the clearing-house, to recover the amount paid by mistake. The points raised, and the disposition made of them will be best gathered from the language of the opinion, delivered by Rapallo, J. After citing and commenting upon the various cases, he makes special reference to the opinion of Judge Story in Bank of the United States *v.* Bank of Georgia, as follows: —

The excess may be recovered, unless an innocent party would be prejudiced by the bank's negligence and the recovery.

"But giving to that decision, for present purposes, its largest scope, it goes no farther than to hold that, in case of an alteration in the body of an instrument, the recognition of the altered instrument as genuine is binding upon the party who made the body as well as the signatures. And the distinguishing feature of all the cases is, that the forgery ought to have been detected by a bare inspection of the instrument itself, without the necessity of reference to books, or anything outside of the document presented, even the memory of the party as to the written obligations which he has issued."

[1] § 481. Master *v.* Miller, 4 T. R. 320; Taylor *v.* Moseley, 6 C. & P. 273; and see Langton *v.* Lazarus, 5 M. & W. 629; Henman *v.* Dickinson, 5 Bing. 183.

[2] National Bank of Commerce *v.* National Mechanics' Banking Association, 55 N. Y. 211.

He then continues: "In the present case it is contended that, when the check for fifty-six dollars was certified by the Bank of Commerce, such certification made it an obligation of that bank; that, when subsequently presented to the bank in its altered condition as a check for $15,006, the bank was bound to know its own obligation, and to detect the forgery; and that the bank, by recognizing it as genuine, and acquiescing in the payment through the clearing-house, precluded itself from afterward setting up its own mistake. On general principles, mere negligence in making the mistake is not, as has been already shown, sufficient to preclude the party making it from demanding its correction.

(*b*) "Such negligence does not give to the party receiving the payment the right to retain what was not due, unless he has been misled and prejudiced by the mistake. If his loss had been incurred and become complete before the payment, he should not, in justice, be permitted to avail himself of the mistake of the other party to shift the loss upon the latter. To render it compulsory upon the courts to refuse a correction of the mistake, the facts of the case must bring it within the excepted ones before referred to. This the facts of the present case fail to do. The essential element is wanting, that the body of the instrument as well as the certification was the work of the bank, and that therefore it was conclusively presumed to know by a mere inspection of the instrument whether or not it had been altered. The bank was not bound to know the handwriting or genuineness of the filling up of the check. It was legally concluded only as to the signature of the drawer and its own certification. The rules of law in relation to the correction of mistakes of fact have been gradually growing more liberal, and are moulded so as to do equity between the parties. The exceptions which have been established by authority, and have been engrafted upon the commercial law, it is not our purpose to disturb, but they should not be extended; unless a case is clearly brought within them, the general principles should govern. No case has been cited, nor do I think any can be found, which holds that a payment by mistake, such as is shown in the present case, cannot be re-

covered back. If the defendant had shown that it had suffered loss in consequence of the mistake committed by the plaintiff, — as, for instance, if, in consequence of the recognition by the plaintiff of the check in question, the defendant had paid out money to its fraudulent depositor, — then, clearly, to the extent of the loss thus sustained the plaintiff should be responsible. But it appears that all the money which Greenleaf, the fraudulent depositor, obtained from the Mechanics' Banking Association, on the credit of the altered check, was paid out on the 16th of February, the day before the check was presented to the plaintiff. On the 16th, Greenleaf drew out of the Mechanics' Banking Association a larger amount of money than that for which it had given him credit on the faith of the altered check, and he drew none afterward. The recognition of this check by the plaintiff on the 17th of February could not have had any influence upon the action of the Mechanics' Banking Association in paying Greenleaf's drafts on the 16th. The loss occasioned by those payments had been fully incurred by the Mechanics' Banking Association before the plaintiff had made the mistake which it seeks in this action to have corrected. Such being the case, there is no equity in the claim of the Mechanics' Banking Association to retain the money which it obtained from the plaintiff through mistake, and thus to shift the loss which it had sustained, through the fraud of its own customer, from itself to the plaintiff. Neither do we find anything in the conduct of the plaintiff, after the payment of the check, which should preclude it from reclaiming the money which it has paid. Delay in discovering and giving notice of the mistake is complained of; but the evidence shows that notice was given immediately on the discovery of the mistake, and it fails to show that, by the failure to receive earlier notice, any damage was sustained by the defendant. All the judges of the court below are agreed upon this branch of the case, notwithstanding their division upon the principal question." [3]

[3] National Bank of Commerce *v.* National Mechanics' Banking Association, 55 N. Y. 211.

The judgment for the amount of the altered check, less the amount of the original check, which had been rendered by the lower court, was affirmed, all the judges concurring.

(*c*) When a bank certifies as good a check on it to the order of a certain payee, and the check is subsequently altered by the drawer so as to make it payable to bearer, and thus altered is paid by the bank to some unknown party before the original payee is advised of the certification, and before any third party has acquired any interest in the check, the bank cannot be held for any loss to others caused by paying the check, because of an agreement between those others and the drawer, to which the bank was not privy.[4]

Negligence of bank leaving open the way to forgery.

(*d*) But when a bank certifies a check so drawn as to admit of easy alteration, it is liable to a *bona fide* holder for value for the whole amount of the check, excess and all.

§ 482. **Alteration of Check before Certification.** — The better doctrine seems to be that certification of a check by a bank is a voucher on the part of the bank only for the facts that the signature is genuine, and that there are funds enough to pay the amount for which the check purports to be drawn; that the bank does not warrant the genuineness of the body of the check, or of any indorsement upon it; and that if there has been any fraudulent alteration or forged indorsement prior to certification, the certification, like the payment, is made under a mistake of facts; and as the payment could be recovered back, so the certification is not binding. An elaborate and conclusive opinion by Allen, J., in 1874, determines this point very satisfactorily. The case was as follows.[1] A depositor in the plaintiff bank drew upon it his check for $25, payable to the order of H. S. The check was offered by a stranger to D. & Co. in payment for gold, which it was proposed to purchase from them, and the name of the

Certification only warrants drawer's signature and funds; and any excess paid on a raised check may be recovered.

[4] Abrams *v.* Union National Bank, 31 La. An. 61.

[1] § 482. Marine National Bank *v.* National City Bank, 59 N. Y. 67 (1874).

drawer of the check was given to D. & Co. as that of the purchaser of the gold. But before the check was actually shown to D. & Co. it had been so altered as to call for a much larger sum, and to be payable to the order of D & Co. Before completing the transaction by delivery of the gold, D. & Co. sent the check to the plaintiff bank, and had it duly certified. The gold was then delivered. D. & Co. deposited the check to their credit in the defendant bank, and it was paid in due course of business by the plaintiff. A suit to recover the amount was determined in favor of the plaintiff. The points made in the decision were, that the certification was indeed the engagement of the bank that the signature was genuine, and so in fact it was; that the drawer had standing to his credit the amount drawn for, and so in fact he had; and that this amount should "not be withdrawn from the bank by the drawer of the check," and in fact this amount had not been so withdrawn by the drawer of the check. The plaintiff bank, therefore, had fulfilled all the obligations under which the act of certification had placed it.

(*a*) To the same purport is another New York case, recently determined. The messenger who brought the check, in this instance, showed it to the teller, remarking that the senders did not like the looks of the person who offered it, and wished to be sure that it was right "in every particular." The teller examined it, certified it, and assured the messenger that it was right in every particular. The court lay down the law as in the foregoing case; and add, that the bank was not estopped by the assertions of the teller to show a forgery in the body of the check before certification; for that any representations made by him as to anything except the genuineness of the drawer's signature [and doubtless it should have been added, the sufficiency of funds] were unauthorized, and not binding on the plaintiff.[2] Evidence that it was the custom of banks and merchants to understand certification as warranting the whole check was rejected.

Any representations as to body of check are beyond authority.

[2] Security Bank of New York *v.* National Bank of the Republic, 67 N. Y. 458 (New York Court of Appeals, Dec. 12, 1876).

(*b*) The point has come up also in the Supreme Court of the United States, though not in such shape as to cover the whole ground quite so conclusively as does the foregoing New York case. A genuine check was altered so as to read for a larger sum and to a different payee; to this payee it was offered by a stranger; the payee, before taking it, sent it to the bank on which it was drawn to inquire whether it was good. The teller looked at it, and at the drawer's account, and said, "It is good [or, It is all right]; send it through the clearing-house." The payee received payment in due course, through the clearing-house, the next day. When the fraudulent alteration was discovered, the paying bank sued to recover the amount from the payee. The court expressed much reluctance to treat the remark of the teller as creating an acceptance of the check; but held that, even if this point should be conceded, yet it would not follow that the bank should be considered to have guaranteed the genuineness of the instrument, in any particular, save as to the drawer's signature, and the fact that the drawer had sufficient funds to his credit to meet the draft. Whether, if the bank had certified the check in writing, and so sent it forth to circulate as money, to have the effect of a certificate of deposit, or an accepted bill of exchange, the bank might not be held to guarantee the entire instrument, was a question as to which the court expressed much doubt, carefully distinguishing it from the question actually before them for determination upon the special facts of the case. The information was sought by the payee simply in order that he might govern his own action thereby, not in order that he might be enabled to put the paper upon the market. The teller, not having his attention directed to any of those parts or features of the instrument with which he could not be supposed to be peculiarly conversant, was entitled to suppose that he was to answer only as to the facts with which he was peculiarly conversant; viz. the drawer's signature, and the sufficiency of the drawer's account. He had no reason to suppose that the payee was asking whether or not the payee's own name was fraudulently written. But had he had his attention in any way called to

the whole instrument, a different question would have arisen. It may be doubted whether it is within the function of the teller or cashier to bind the bank by a guaranty as to any fact concerning the check, save only the two special facts concerning which it is his business to have and to impart information.[3]

"Where money is paid on a raised check by mistake, neither party being in fault, the general rule is, that it may be recovered as paid without consideration; but if either party has been guilty of negligence or carelessness by which the other has been injured, the negligent party must bear the loss."[3]

(*c*) A check, being brought to H. for discount, was taken to the cashier by H. to know if it was good and would be paid. The cashier said it was good. H. paid money for the check, presented it next day, and received the cash. The check had been raised before it was taken to H. in the first place. Neither H. nor the bank knew this fact. The bank recovered the money as paid by mistake; the representation could have no more effect than certification, and certification only warrants the signature of the drawer and the sufficiency of funds.[4]

(*d*) Where a check, after leaving the drawer's hands, was raised by some person not authorized to do so, and was subsequently certified by the bank, the court held that the bank had not bound itself to pay the amount of the altered check, and that, having made the payment, it might recover back the amount.[5] And the facts that the holder had sent the check in its raised state to the bank, inquiring if the certification was good, and that the teller replied that it was, did not make the bank liable. The bank was bound not to do anything intentionally or carelessly that would mislead the holder, or upon which he might properly rely to his damage; but the attention of the teller was not called to the body of

[3] Espy *v.* Bank of Cincinnati, 18 Wall. 604 (1873); Helwege *v.* Hibernian National Bank, 28 La. An. 520 (1876).

[4] Parke *v.* Roser, 56 Ind. 503 (1879).

[5] Clews *v.* Bank of New York National Banking Association, 89 N. Y. 418 (reversing decision in 8 Daly, 476).

the check; there was no inquiry as to whether it was in the same condition as when certified, but only if the certification was good, and the effect was the same as that of an original certification.

(*e*) Upon appeal it was held that the plaintiff had a right to go to the jury on the question whether it was culpable negligence in the teller to answer that the certificate was good, without comparing the draft with his certification-book and book of stopped payments, and whether the question to the teller was understood by the parties to refer to the validity of the certification, or simply to the genuineness of the marks of certification.[6]

(*f*) But in Louisiana, where a check was certified after it had been raised, and was afterward paid by the certifying bank, it was held that the latter could not recover the money thus paid upon its certification.[7] The holder took on faith of the certification, and the court said that, as one of two innocent parties must bear the loss, it should be the one whose act caused the loss, and endeavored to distinguish the Espy case by saying that the certification was only verbal in that case. It seems to us to be a question properly to be decided by the understanding of business men and banks as to the meaning of certification. It is established that it warrants the drawer's signature and funds; so far the taker has a right to rely upon a certification, but beyond that no holder has a right to rely unless a further meaning is given the act by usage or agreement, and until this is proved courts should not enlarge the contract or increase the burden of the bank. As to facts beyond the two named, both parties are equally bound to inquire.

Louisiana *contra*.

§ 483. A bank issued a draft for $500; the purchaser (B.) in Texas sent it to New York, where it was paid, having been raised to $5,000. Held, the Texas bank could not recover the amount of the purchaser.[1] This case raises no question

[6] Ibid., 105 N. Y. 398 (1887).

[7] Louisiana National Bank *v.* Citizens' Bank of Louisiana, 28 La. An. 189 (1876).

[1] § 483. City National Bank of Fort Worth *v.* Stout, 61 Tex. 567.

in the mind of the reader except as to the sanity of a bank that could expect to recover from B. for the raising of a draft after it left his hands.

§ 484. **Alteration in printed Part of Check.** — In Mahaiwe Bank *v.* Douglass,[1] it was claimed that it was customary for banks to discount paper written on printed blanks, where the printed matter, or some part of it, had been erased or lined out, and that such erasure or striking out did not cast suspicion on the paper, or put the bank upon inquiry. The court declined to adopt this doctrine, saying: "It would be an innovation upon the system of mercantile law, equally impolitic and unsupported by authority, to hold that any and every part of a bill or note may appear to be erased, and other words written upon the erasure, or in the place of the words erased, without putting the party to whom such paper is offered upon inquiry, merely because the words erased were printed, instead of written with a pen. Such custom, we are persuaded, has not yet existed so long or become so general as to make it part of the law merchant. . . . It seems more in accordance with principle and reason to hold that the effect of apparent erasures and alterations in exciting distrust and putting upon inquiry depends more upon the significance and importance of the words erased, than upon the way in which they were first impressed upon the paper; and such, we are satisfied, is the rule of law."

§ 485. **Alteration must be Material.** — The alteration, to be entitled to any effect or consideration at all, must be in a material part of the instrument.[1] Whether or not the alteration is in a material part is a question "easily tested by inquiring whether the instrument would have the same legal effect and operation after the alteration as before it."[2] If the analogy of the Rhode Island case cited may be trusted, an alteration of the figures upon the check to make them correspond to the written words would not be objectionable.

[1] § 484. 31 Conn. 170, at p. 182.

[1] § 485. Mahaiwe Bank *v.* Douglass, 31 Conn. 170, at p. 181; Smith *v.* Smith, 1 R. I. 398; Gardner *v.* Walsh, 32 Eng. L. & Eq. 162.

[2] Wheelock *v.* Freeman, 13 Pick. 165 (1832).

One to whom a check had been intrusted by the payee to pay into a bank, absconded, and after altering the date from March 2 to March 26, transferred it to V. for value. The check was not paid, payment having been countermanded by the drawer. In an action by V. against the drawer, held that the alteration was material, and invalidated the check; and that the fact was immaterial, that V. had been guilty of no negligence in taking it.[3]

Alteration in date is material.

No alteration (even though fraudulent and unauthorized), of the marginal figures can vitiate the bill, as a bill for the full amount inserted in the body, when it reaches the hands of a holder for value who is unaware that the marginal figures have been improperly altered.[4] No injury is done, for the writing controls the figures. Alteration of figures in the margin does not avoid,[5] but addition of place of payment does, as to parties not consenting.[6]

Alteration in figures does not vitiate.

Erasing and Rewriting is Forgery, though the same name be written as was originally on the paper.

A somewhat singular occurrence, perhaps not likely to be duplicated, arose in the case of the National Park Bank *v.* Ninth National Bank.[7] A genuine check or draft was drawn payable to the order of E. S., and signed by W. R. as cashier. The name of the payee, the amount, and the signature, were all erased; a larger amount and the name of a different payee were written, and the name of the same cashier was *rewritten*. The court (Allen, J.), commenting upon these circumstances, says: "The fact that a genuine check had been drawn, and signed by the proper party upon the same piece of paper, does not affect the character of the instrument in its altered and forged condition. The forger, by skilfully obliterating the genuine signature, together with the words and figures in-

[3] Vance *v.* Lowther, 1 Ex. D. 176 (1876).

[4] Garrard *v.* Lewis, 10 Q. B. D. 30 (1882).

[5] Woolfolk *v.* Bank of America, 10 Bush, 504 (Ky., 1874). See Leas *v.* Walls, 101 Pa. St. 57, where 8 in the margin was changed to 80, and "eight" to "eighty," space being carelessly left.

[6] Whitesides *v.* Northern Bank, 10 Bush, 501 (1874).

[7] 46 N. Y. 77.

dicating the amount payable thereon, effectually destroyed the instrument; and it was incapable of being restored to its original condition in the form of a check, and made available for any purpose. It was but a blank form of a draft or bill; and the act of signing the name of the cashier as drawer, with intent to utter and pass the same as genuine, was a crime, and the signature a forgery, whether the check was for the same or a different amount from that for which the original and genuine bill had been drawn. Whether the forger used the same paper on which the original instrument had been written and signed, and manipulated to serve his purposes, or made and forged a check on another and different piece of paper, is not material, so long as the signature of the drawer was counterfeit. The drafts paid by the plaintiff were not merely raised checks, that is, forged and altered by the obliteration and removal of one sum and the insertion of another, but were forged instruments in every sense."

§ 486. **Checks signed in Blank and Fraudulently filled up.** — I have found no case in which a check signed in blank by the depositor has been subsequently filled up fraudulently, and question has been made as to who should bear the loss. Reason and principle must, however, be taken to make it plain that whosoever runs the risk inevitably attendant upon executing such an instrument in blank shall be held to bear any loss arising therefrom. There are authorities which, by analogy, sufficiently support this doctrine. For instance, in the case of Russell *v.* Langstaffe,[1] defendant had indorsed certain blank notes or checks. Lord Mansfield said: "The indorsement on a blank note is a letter of credit for an indefinite sum." In an early case in Massachusetts, Parsons, C. J. held that the partnership which had left certain notes signed and indorsed in the firm name and in blank was liable to pay to a *bona fide* holder for value the amount which had fraudulently been filled in.[2] It has been held in Connecticut,

[1] Dougl. 514. The same general rule is admitted, though the cases are not decided under it, in Lancaster National Bank *v.* Taylor, 100 Mass. 18; Whistler *v.* Forster, 18 C. B. N. S. 248.

[2] Putnam *v.* Sullivan, 4 Mass. 45.

that, though the party to whom the check or note is intrusted, signed in blank, may have power to *fill it up* as he pleases, yet he has no power to *alter* any portion of it which is complete when he receives it. Such alteration avoids the paper, puts the bank on its inquiry, and consequently will leave the bank to bear the loss, if it pays when it should not.[3]

The Port Richmond Pottery Co. being indebted to S. W. & Co., a note in blank was indorsed by the president of the corporation, "G. S. B., Pres't." The amount was afterward filled in, the note made payable to the order of G. S. B., and the abbreviation "Pres't" was erased fraudulently; and in this condition the note was handed to S. W. & Co. It appeared that S. W. & Co. had knowledge that G. S. B. was president of the company. The court said that S. W. & Co., having this knowledge, would have been unable to hold the indorser as an individual, had the erased word still been upon the note when they took it. The erasure was therefore a material alteration. But S. W. & Co., having taken the note for an antecedent debt and surrendered no security, were not holders for value, and consequently could not recover against G. S. B. individually.[4]

But when an instrument signed in blank, and which has been fraudulently filled up for an amount in excess of that authorized by the signer, is made payable to the order of any person, it must be duly indorsed by such payee before maturity and before the *bona fide* taker or holder has any knowledge of the fraud. Where such an instrument is, through neglect or any other reason, transferred without the indorsement, and the indorsement is put upon it subsequently after maturity of the paper, or after the holder has some knowledge concerning the fraud, the paper will be subject to all defences which could have been set up by the original signer in a suit brought against him by the original payee, although the actual transfer was made *bona fide* for value, and before maturity.[5]

[3] Mahaiwe Bank *v.* Douglass, 31 Conn. 170, at p. 181.

[4] Sharpe *v.* Bellis, 61 Pa. St. 69 (1869).

[5] Lancaster National Bank *v.* Taylor, 100 Mass. 18; Whistler *v.* Forster, 18 C. B. N. S. 248.

§ 487. **Within what Time Notice of Forgery must be given.** — Fifteen,[1] fourteen,[2] seven[3] days', and even one[4] day's delay, after payment on forged indorsement or signature, has been held fatal. But as we shall see, the best opinion is that no lapse of time is sufficient to bar recovery if the defendant will be no worse off by the correction of the mistake than he would have been if payment had been refused, and provided notice is promptly given on discovery of the fraud. And the mere fact that the usual time for notifying the person who indorsed the paper to the defendant has passed, is of no moment, for the indorser or transferrer warrants the genuineness of the papor, and if it is a forgery he is entitled to no notice of dishonor,[5] and the remedy over against him is good. And where the payee is in fault equally with the payor, or to a greater degree, even though the lapse of time between payment and discovery may have resulted in loss to the payee, the payor may still recover; the loss is the payee's own fault.

§ 488. **The Old Cases.** — Where the bank seeks to recover from the payee, it was formerly held rigorously to make the discovery of the forgery, and to give notice of it to the holder with great promptitude, — though mere promptitude cannot alone create the right to recover, as has been already seen.[1] This rule, laid down in nearly all the cases cited in the foregoing pages, is perhaps infringed by Bank of North America *v.* Bangs (*supra*), where the lapse of twelve days did not deprive the plaintiff of the right to recover; and that too although, had notification been made at once, the defendants might possibly have remembered from whom they had received the

Bank must discover in time to save payee's rights by giving regular notice of dishonor.

[1] § 487. Gloucester Bank *v.* Salem Bank, 17 Mass. 33.

[2] Davies *v.* Watson, 2 Nev. & M. 709.

[3] Smith *v.* Mercer, 6 Taunt. 76.

[4] Cocks *v.* Masterman, 1 Barn. & Cr. 902; 17 E. Cr. L. R.

[5] 1 Pars. N. & B. 560; Turnbull *v.* Bowyer, 40 N. Y. 456 (1869). See the same principle, Burrill *v.* Smith, 7 Pick. 291. See also Daniel on Neg. Inst., § 1371.

[1] § 488. Levy *v.* Bank of United States, 4 Dall. 234.

check, and have had some chance to recover the amount; whereas, when notification was given them, they had wholly forgotten the circumstances. It is also at the least a very strong point, and probably an absolutely essential one, that in the interval between the presentment and payment, and the notification to the payee, he should have been deprived of no legal rights, and should have lost no practical opportunity, or even possible chance, of saving himself from loss upon the paper.[2] In the case of Wilkinson *v.* Johnson,[3] it will be remembered, the payment and the return of the forged paper were both made within business hours of the same day, and the court dwelt with emphasis upon this, and upon the consequent fact that the payees had lost none of their remedies against indorsers or others. The case of Cocks *v.* Masterman[4] is commonly regarded as a leading authority on the subject of the time within which discovery must be made and notice given.

The day after maturity held too late.

There the bill forged was returned on the day following that of the payment upon it. The court said: "We are all of opinion that the holder of a bill is entitled to know on the day when it becomes due whether it is an honored or dishonored bill, and if he retain the money, and is suffered to retain it the whole of that day," the payors cannot afterwards recover it back. For the holder, though not bound to notify the drawer and indorsers till the day after the dishonor, is yet entitled to do so, if he sees fit; and the payors ought not by their negligence to be allowed to deprive the holder of the right of proceeding on the first day if he so chooses. In the opinion delivered in the case of the Canal Bank *v.* Bank of Albany,[5] and also in the dissenting opinion of Ruggles, J. in the case of Goddard *v.* Merchants' Bank,[6] this ruling in Cocks *v.* Masterman is criticised as too

[2] Wilkinson *v.* Johnson, *supra;* Smith *v.* Mercer, 6 Taunt. 76; Cocks *v.* Masterman, 9 Barn. & Cr. 92; Price *v.* Neale, 3 Burr. 1354; Smith *v.* Chester, 1 T. R. 654; 1 D. & E. 655. The dissenting opinion of Ruggles, J. in Goddard *v.* Merchants' Bank, 4 N. Y. 147.

[3] 3 Barn. & Cr. 428.

[4] 9 Barn. & Cr. 92.

[5] 1 Hill, 287.

[6] 4 N. Y. 147.

severe. The court, in delivering this opinion, take pains to prevent its being construed, by inference or otherwise, to pass as an authority for more than the simple ruling that a notice and return on the day following that of the payment on a forged bill is too late. They expressly "decline to give an opinion whether the plaintiffs could have recovered if notice had been given on the same day." In Smith *v.* Mercer[7] the drawee's acceptance of a draft, payable at his banker's, was forged. The banker paid it, and discovered the forgery only after the lapse of seven days. In a suit to recover the money, as having been paid under mistake, judgment was rendered for the defendant. Some of the judges laid great stress upon the fact that the defendant had lost his remedy against indorsers before he had notice of the forgery. Dallas, J. said: "Suppose Smith & Co. had not paid it, it would have been immediately returned, and it might have been recovered or put in suit. But the effect of the delay has been to give him an extended credit; and how am I able to say that his situation in the intermediate time may not have undergone such a change as to render him incapable of paying what he could have paid upon proper notice and demand? The ground, therefore, upon which I rest my opinion, and to which I wish to confine it, is the want of due caution in having paid the bill, the effect of which has been to give time to different parties, which the plaintiffs were not authorized to do."

Smith *v.* Mercer seven days too late.

Other cases say, in somewhat indefinite language, that the discovery and notice must be "immediate."

In Vermont a case[8] arose wherein a check, payable to J. W. or bearer, was purchased by a bank from J. W., and was indorsed over by him to the bank. The purchasing bank forwarded it to the bank on which it was drawn, and received credit for it on an account which was kept between the two banks. It was held that the lapse of two months, occurring before the drawee bank discovered the forgery and notified it to the purchasing bank, would prevent

Two months no recovery.

[7] 6 Taunt. 76.

[8] Bank of St. Albans *v.* Farmers & Mechanics' Bank, 10 Vt. 141.

the drawee from recovering the amount. For in the interval it was impossible to say what remedies might have become unavailing to the purchasing bank, which, at an earlier date, it might have had. It had certainly lost the opportunity to give immediate notice to the indorser, J. W., and even if it could be shown that he was aware that the maker's signature was forged, so that notice might be dispensed with, yet other remedies might have been lost. The court could not "pronounce judicially that the defendants could, at a future day, command the same facilities for redress which existed when the check was first presented." The court of Massachusetts[9] appears to have felt no scruples about extending its judicial knowledge beyond the limits established by the court of Vermont.

Clearing-house rules.

An effort has been made, though ineffectually, to limit the right of the bank which has made the erroneous payment, as to the time within which it must return the check, by means of the rules of the clearing-house association. The question did not arise at first concerning a forged check,[10] but the principle evidently covered that case, and was subsequently expressly declared to do so.[11] The rule of the association gives to the drawee bank until one o'clock to make return of any check which has been put into it through the clearing-house and which is not good; and it is declared that in no case shall checks which are not good be retained after that hour. The court say, that until one o'clock the payment of the check is only provisional; that at one o'clock, the check not having been returned, the payment becomes complete. But it is then simply *a payment;* the rights of the parties are precisely the same as if the payment had been made at that hour over the counter; and these rights are not reached or affected by the clearing-house by-law.

§ 489. **The Better and Later Doctrine.** — The plaintiff not being in fault in not sooner making discovery, no mere length

[9] In National Bank of North America *v.* Bangs, 106 Mass. 441.

[10] Merchants' National Bank *v.* National Eagle Bank, 101 Mass. 281.

[11] National Bank of North America *v.* Bangs, 106 Mass. 441.

of time will bar recovery of money paid on a forged indorsement, if upon discovery prompt notice is given.[1]

Where each party has equal chance of knowledge of the handwriting forged, no case demands more than reasonable diligence in giving notice after discovery.[2]

In Massachusetts the lapse of twelve days did not bar recovery by the bank, even in case of forgery of the drawer's signature.[3]

(*a*) A United States postmaster gave B.'s attorney (A.) a draft payable to B. A. forged B.'s indorsement, and got the money. The National Bank of R. on which the draft was drawn, paid it to the Bank of A., which had cashed it. *Three years* after, the forgery was discovered in the Treasury. Six days after discovery, the United States notified the bank of it, and in nine days furnished the proofs. Held, "that the payment of a forged check gives no right of action *on the paper itself*, against any party to it; as in the case of a bill or note or check which had been dishonored, the party paying can only sue the party paid for money had and received, leaving it to the latter to sue in the same manner his immediate predecessor in the transaction; and as the defendant bank had not been deprived of its recourse against the only party it could have sued, viz. the Bank of A., there being still three years left, under the Statute of Limitations of New York, after it received notice of the forgery, in which it could have brought suit, no such laches had been shown on the part of the United States as would disentitle it to recover."[4]

Suit for money paid on forged indorsement not barred for six years at least.

(*b*) A bank, having paid money to B. on a check, discovered next day that it was a forgery, and that day or the one following notified B. Held, that the paying bank could recover.

[1] § 489. Star Fire Ins. Co. *v.* New Hampshire National Bank, 60 N. H. 442.

[2] Schroeder *v.* Harvey, 75 Ill. 638 (1874); citing Canal Bank *v.* Bank of Albany, 1 Hill, 287; Magee *v.* Carmack, 13 Ill. 289; Union National Bank *v.* Baldenwick, 45 Ill. 375 (1867).

[3] National Bank of North America *v.* Bangs, 106 Mass. 441.

[4] United States *v.* National Bank of the Republic, 2 Mackey, 289 (1883).

"The payor must be allowed a reasonable time to detect the forgery and demand restitution." What is reasonable depends "on the circumstances of each case." At all events, "it is not necessarily the day of payment nor the day after." "Where no negligence is imputable to the drawee in failing to detect the forgery, want of notice within the time which ordinarily charges previous parties on negotiable paper is excused, provided it be given to the holder as soon as the forgery is discovered." [5]

When money is paid on a forgery, and the parties are in mutual fault, it can always be recovered.[6]

(*c*) Return on Tuesday of a forged check, which had been presented through the clearing-house on Monday, has been held sufficiently prompt; although the depositor had already, on Monday, drawn against this deposit.[7]

(*d*) In the case of an indorsement forged upon a draft, it was held, in a suit brought by the bank which had paid the draft against the depositor of it, that discovery of the forgery was sufficiently prompt, though seventeen days elapsed between the deposit and the discovery.[8]

Seventeen days not too long a delay.

(*e*) Even the United States Government must give prompt notice upon discovery of a forgery. No mere statute of limitations can bar the Government of the United States, whether it is named in the statute or not; and when the United States sues in its own courts, such a statute is not within the Judiciary Act of 1879, making the laws of the States rules of decision in the courts of the United States in cases where they apply. No laches can be imputed to the Government, and no time runs against it.[9] But when the Government deals in commercial

Laches.
Statute of Limitations. U. S.

[5] City Bank *v.* First National Bank, 45 Tex. 203; Third National Bank *v.* Allen, 39 Mo. 310; Canal Bank *v.* Bank of Albany, 1 Hill, 287.

[6] Redington *v.* Woods, 45 Cal. 406 (1873).

[7] Corn Exchange National Bank *v.* National Bank of the Republic, 78 Pa. St. 233 (1875).

[8] Chambers *v.* Union National Bank, 78 Pa. St. 205 (1875).

[9] United States *v.* Thompson, 98 U. S. 486; United States *v.* Kirkpatrick, 9 Wheat. 720.

paper, it subjects itself to the rules governing such paper,[10] and as promptness in giving notice of a discovered forgery is a condition precedent to recovery,[11] the Government is as much bound to promptness in such case as an individual. It is not the case of a right fixed and existing barred by lapse of time, but a question of what is necessary in order that any right shall arise.[12]

Promptness in notice of forgery is a condition of recovery.

[10] Cooke *v.* United States, 91 U. S. 389 (1875); United States *v.* National Bank, 6 Fed. Rep. 134; United States *v.* Clinton National Bank, 28 Fed. Rep. 357.

[11] 2 Daniel on Neg. Inst., § 1371; 2 Pars. N. & B. 598.

[12] Mayer *v.* Hartranft, 28 Fed. Rep. 358.

CHAPTER XXXIV.

EFFECT OF A CHECK.

§ 490. Analysis.

A. As an Assignment of the Deposit. The best opinion is, that as

(1) Between the Bank and the Holder,

A check is an assignment of the funds of the drawer to the amount of the check, which assignment is complete upon presentation of the check, and if the bank improperly refuses payment, 430, 310, the holder may sue the bank. But a check is no assignment as to the bank till notice is given to it. 514

See H, I, J, K, L, below, in this analysis.

This is the Illinois doctrine; but the U. S. Supreme Court, following New York, holds that the bank is answerable to the holder directly only when it has accepted 403 the check.

§ 498. (2) Between Holder and Creditors of Drawee Bank.

The holder has no preference, for the depositor himself would have none.

(3) Between Holder and Drawer.

A check in the hands of a *bona fide* holder for value (or one who can claim in the right of such a holder) is an assignment, *pro tanto*, of the deposit upon which it is drawn, as against the drawer and his creditors subsequently attaching; and in case of the drawer's insolvency before the check is paid, the holder recovers in full, in preference to the general creditors, so far as the deposit on which the check was drawn is traceable in the bank or in the estate. (If the drawer were guilty of fraud in giving the check, the payee could rescind and claim the consideration he gave, if he could identify it.) A larger number of cases hold this rule than the one above, but there is still conflict.

See H, K, M, and L.

§§ 539–541.

B. Effect between one Holder and Another.

§ 497. If the same drawer issues a number of checks, the one first presented must be paid first; and a holder of a check, B, presented later than C., can find no fault with either bank, or the holder of the check C., drawn subsequently to B., but presented before B., thereby reducing the funds below the amount of B.

C. Conflict of Laws.

§ 542. The effect of a check is determined by the law of the place where payable, except that as against the drawer or his assignee for

creditors coming into possession of the deposit, the law of the State where the check is drawn and the drawer resides will control.

D. Effect of a Check as Payment.

§ 543. Analysis.

E. Effect as a Gift.

§ 548. Analysis.

F. Effect as Evidence.

§ 552. Between drawer and payee.

Prima facie, a circulated or cancelled check is evidence of a debt and payment, but it may be shown to have been a loan.

§ 553. Between drawer and bank.

§ 554. G. Check as a Testamentary Document.

H. Consideration of the Question of Assignment.

§ 492. Special facts, taking the question of a holder's right of action out of the region of doubt.

§ 493. The general problem. The weight of authority is with the first class of cases.

§ 494. The weight of reason is with the second class of cases.

§ 495. The middle ground. The third class of cases.

§ 496. Discussion of grounds of decision as to effect of check.

§ 497. Between one holder and another.

§ 498. Between holder and creditors of drawee bank.

§ 499. Between bank and holder.

§§ 500, 499, note 1. If A. pays money to B. for C., the latter may sue B.

§ 501. Between drawer and bank.

§ 502. Fallacy in the New York view. Causes of confusion.

§ 503. Built on cases aside from the point.

§ 504. Narrowness of view.

§ 505. Failure to draw the line at presentment.

Objections to the Illinois doctrine considered.

§ 506. Want of privity.

§ 507. Double action by drawer and holder against the bank.

§ 508. Uncertainty of payee, and amount of check at time of deposit.

§ 509. Countermand.

§ 510. Absence of words of transfer.

Review of the Cases.

I. Cases in which, by reason of special facts,

(1) The holder may sue drawee.

§ 511. (*a*) Designated fund.

(*b*) Bank charging the drawer.

(*c*) Words of transfer in check.

(*d*) Certification.

(*e*) Communicated promise of bank to pay before the holder took the check.

(*g*) Check for whole deposit.

(*h*) Death of drawer. Equity will relieve against the bank.

(*l*) When bank knows money to be really that of the holder, though in the drawer's name.

(2) Holder cannot sue drawee.
(*i*) Check not against funds.
(*j*) Deposit consisting only of unpaid drafts.
(*k*) Drawee bank insolvent before paying of check. Holder no preference to general creditors of the bank.
(*f*) Check no effect on bank till notice.

§ 512. J. Cases in which the holder sued the bank, claiming that the latter was guilty of breach of trust.
In one at least of these, (if not in both,) it was clear that the bank was guilty of applying to its own claim on general balance a deposit specifically made to pay the holder, but on the ground of want of privity the holder's suit was dismissed.

K. Cases denying that a check-holder can sue the drawee bank, or that the check operates as an assignment, legal or equitable.
§§ 513, 514. U. S. (§ 515. Ala.) (§ 516. Eng.) § 517. Ind. § 518. La. § 519. Md. § 520. Mass. § 521. Mich. § 522. Mo. § 524. N. Y. § 525. N. J. § 526. Penn. § 527. Tenn.

L. Cases affirming the holder's right to sue the drawee bank, or announcing principles from which that ruling flows.
§ 528. U. S. § 529. Eng. § 530. Ill. § 531. Iowa. § 522. Ky. § 533. N. Y. § 534. Ohio. § 535. Penn. § 536. S. C. and La. § 537. Wisc. § 538. Miscellaneous.

M. Authorities for holding that a check is at least an equitable assignment between drawer and payee.
§ 539. United States. § 541.
§ 540. Ohio.

§ 491. **The Rights of a Check-holder.— The Chief Questions.—** (1) Is a check an assignment between the drawer and a *bona fide* holder for value, so that the latter will be preferred to the general creditors of the drawer in case of his insolvency before the check is cashed? (2) Is a check an assignment as to the bank, so that the holder can sue the bank for refusal to pay upon the presentation of the check? These are two of the most interesting questions of banking law. In many States have learning and eloquence been drawn up in battle array to decide the issue, and with sadly varying results.

§ 492. **Special Facts.** (See § 511.)— (*a*) There may exist special facts giving an equation easy of solution, as if the check is drawn on a designated fund, or is accepted by the bank, or if the bank charges the amount to the drawer, or settles with him on the basis of allowing for the check, or if the check contains words of absolute transfer, or if an assignment oral or written was really made aside from the check, or if it is

drawn for the whole deposit, or if the bank makes an express promise to pay the check and the holder takes it on the faith of such promise, or if the money is deposited as the check-holder's so that it is his property from the start, or if, instead of a general deposit, the funds are deposited with the bank specifically, so that they are held in trust for the holder, there is no doubt the bank can be held in an action by the holder, and in England equity gives relief in case of the death of the drawer.

(*b*) And, on the other hand, if a check is not drawn against funds, it is clear the holder has no right to sue the bank, and a check of which the bank has no notice cannot be allowed to affect it injuriously; the equity, if there is one, is secret as to the bank until notice.

§ 493. **The General Problem.** — But when we seek a solution of the general problem of the holder's rights in case of an ordinary check on sufficient funds, the above special facts being absent, authority is as divergent as the rays of the sun.

The most numerous body of decisions sustains the view that a check is neither a legal or an equitable assignment as between drawer and payee, nor a sufficient foundation for any action by the holder against the bank. The authorities[1] for this answer are to be found in the decisions of the United States Supreme Court, and in Alabama,

Weight of authority.

[1] § 493. U. S. National Bank of the Republic *v.* Millard, 10 Wall. 152 (1870); Christmas *v.* Russell, 14 Wall. 69 (1871); Laclede Bank *v.* Schuler, 120 U. S. 511; Essex County National Bank *v.* Bank of Montreal, 7 Biss. 193; Spain *v.* Hamilton's Administrator, 1 Wall. 604; Marine Bank *v.* Fulton Bank, 2 Wall. 252; First National Bank *v.* Whitman, 94 U. S. 343 (1876); Rosenthal *v.* Mastin Bank, 17 Blatchf. 318.

Ala. National Commercial Bank *v.* Miller, 77 Ala. 168.

Eng. Hopkinson *v.* Foster, L. R. 19 Eq. 74 (1874). See Grant on Banking, 4th ed., p. 87, and Bellamy *v.* Majoribanks, 8 Eng. L. & Eq. 523; Williams *v.* Everett, 14 East, 582; Stewart *v.* Fry, 7 Taunt. 339; Wedlake *v.* Hurley, 1 C. & J. 83.

Ind. Harrison, Receiver, *v.* Wright, 100 Ind. 515; National Bank of Rockville *v.* Second National Bank of Lafayette, 69 Ind. 480.

La. Case *v.* Henderson, 23 La. An. 49 (1871).

Md. Moses *v.* Franklin Bank, 34 Md. 574 (1871).

Mass. Carr *v.* National Security Bank, 107 Mass. 35 (1871); National Bank *v.* Eliot Bank, 20 Law Reporter, 138; Dana *v.* Third National Bank,

England, Indiana, Louisiana, Maryland, Massachusetts, Michigan, Missouri, New Jersey, New York, Pennsylvania, and Tennessee.

§ 494. Another class of cases affirm that a check is an assignment as between drawer and payee, so that a *bona fide* holder is preferred to the creditors of the drawer under a subsequent assignment in insolvency; and

Weight of reason.

13 Allen, 445, bill of exchange for more than the deposit. See Bullard *v.* Randall, 1 Gray, 605.

Mich. Second National Bank *v.* Williams, 13 Mich. 282; Moore *v.* Davis, 57 Mich. 255; Grammel *v.* Carmer, 55 Mich. 201. See Strain *v.* Gourdin, 11 N. Bank Reg. 156.

Mo. Dickinson *v.* Coates, 79 Mo. 250; Merchants' National Bank *v.* Coates, 79 Mo. 168; but the judges of other courts in this State are strong the other way.

N. J. Creveling *v.* Bloomsburg National Bank, 46 N. J. Law, 255.

N. Y. Chapman *v.* White, 2 Seld. 412; Winter *v.* Drury, 1 Seld. 525; New York Bank *v.* Gibson, 5 Duer, 574; Grinnell *v.* Suydam, 3 Sandf. 133; Cowperthwaite *v.* Sheffield, 3 Comst. 243; (last four cases, bill of exchange); Luff *v.* Pope, 5 Hill, 413 (order, on time, on an individual); Justh *v.* National Bank, 36 N. Y. Super. Court, 273; 56 N. Y. 478; People *v.* Merchants' National Bank, 78 N. Y. 269 (1879); Ætna National Bank *v.* Fourth National Bank, 46 N. Y. 82 (1871); Risley *v.* Phœnix Bank, 83 N. Y. 318 (1880). Lunt *v.* Bank of North America, 49 Barb. 221, only decides that a check is not so far an assignment of the drawer's funds, complete upon delivery, as to take precedence of a later assignment "of all property now belonging to" the drawer, executed and completed before a presentment of the check. It is a *cognate* principle to that which commands that checks be paid in order of presentment. But see Roberts *v.* Corbin, 26 Iowa, 315; Chapman *v.* White, 2 Seld. 412 (bill of exchange); Bullard *v.* Randall, 1 Gray, 605; Butterworth *v.* Peck, 5 Bosw. 341; Mandeville *v.* Welch, 5 Wheat. 286. But see discussion of this case, Harris *v.* Clark, 3 Comst. 93. In this last-named case the court say that no authorities declare that an ordinary unaccepted bill of exchange operates *per se* as an immediate and complete appropriation or assignment, — and this not even in equity, — save only the case of Corser *v.* Craig, 1 Wash. C. C. 424, which case has been since overruled on this precise point by the authority of Mandeville *v.* Welch, *supra*. The court expressly decline, however, to bring checks into the same category.

Pa. Loyd *v.* McCaffrey, 46 Pa. St. 410. In this case the facts did not call for the doctrine enunciated. Saylor *v.* Bushong, 100 Pa. St. 23; First National Bank of Northumberland *v.* McMichael, 106 Pa. St. 460.

Tenn. Planters' Bank *v.* Merritt, 7 Heisk. 177 (1871).

that, upon presentment, the bank is brought into privity with the holder, and is liable to him for improper refusal to pay, and (in Illinois at least) that a countermand from the drawer is no excuse for such refusal. Upon this side we find a goodly array of authorities,[1] and all the advanced, clear, independent thought and reasoning. See the cases below from the United States, Connecticut, England, Illinois, Iowa, Ken-

[1] § 494. U. S. Mandeville *v.* Welch, 5 Wheat. 286, by the principles announced in it, must be placed upon the affirmative in the question of a holder's right, though not deciding that point.

Conn. See Hoyt *v.* Seely, 18 Conn. 353.

Eng. Ancona *v.* Marks, 7 Hurl. & N. 686. See Grant on Banking prior to his edition of 1873, and Sharswood's Byles, p. 21.

Ill. Munn *v.* Burch, 25 Ill. 21; Bickford *v.* First National Bank of Chicago, 42 Ill. 238; Rounds *v.* Smith, 42 Ill. 215; Brown *v.* Leckie, 43 Ill. 497 (1867); Chicago Marine & Fire Ins. Co. *v.* Stanford, 28 Ill. 168 (1862); Fourth National Bank *v.* City National Bank of Grand Rapids, 68 Ill. 398 (1873); Merchants' National Bank *v.* Ritzmayer, 20 Bradwell's App. 29 (1886); Union National Bank *v.* Oceana County Bank, 80 Ill. 212 (1875); National Bank of America *v.* Indiana Banking Co., 114 Ill. 483 (1885).

Iowa. Roberts *v.* Corbin, 26 Iowa. 315 (1867).

Ky. Lester & Co. *v.* Given, Jones, & Co., 8 Bush, 357 (1871). See Weinstock *v.* Bellwood, 12 Bush, 139 (1876).

La. See Vanbibber *v.* Bank of Louisiana, 14 La. An. 481 (1857).

Mass. See the powerful dissent of Abbott in National Bank *v.* Eliot Bank, 20 Law Rep. 138.

Mo. See 4 Mo. App. 330, 7 Mo. App. 532, and 11 Mo. App. 292 (1881), but overruled in 79 Mo. 168.

N. Y. Harris *v.* Clark, 3 Comst. 93.

Ohio. Bailey *v.* Burgess, 5 Ohio St. 15; Dodge *v.* Bank, 20 Ohio St. 246; Chaffee *v.* First National Bank of Ravenna, 40 Ohio St. 10. The Superior Court of Cincinnati said they could see no just reason why a holder for value in good faith, and against sufficient funds, should not, when he gave notice, hold the specific fund appropriated by the check. McGregor *v.* Loomis, 1 Disney, 247, p. 255. See remarks on this case, In re Smith, 15 National Bank Reg. 459, p. 465; First National Bank *v.* Gish, 72 Pa. St. 13 (1872).

S. Car. Fogarties *v.* State Bank, 12 Rich. 518, a strong case.

Wisc. Pease *v.* Landauer, 63 Wisc. 20 (1885).

Miscel. Brown *v.* Lusk, 4 Yerg. 210; Morrison *v.* Bailey, 5 Ohio St. 13; Corser *v.* Craig, 1 Wash. C. C. 424; Morton *v.* Naylor, 1 Hill, 583; Peyton *v.* Hallett, 1 Caines, 363.

tucky, Louisiana, Massachusetts, Missouri, New York, Ohio, South Carolina, and Wisconsin. Illinois and South Carolina are the strongholds of the doctrine.

§ 495. A third class of cases hold that at any rate a check is an equitable assignment between drawer and payee, whatever may be its effect between holder and bank.[1]

Discussion of the Grounds of Decision in this Matter of the Check-holder's Rights.

§ 496. The plain common sense of the holder's rights would seem to be, —

That as to the drawer, and those claiming under him otherwise than as *bona fide* holders for value, the check is to be sustained as a transfer of the fund against which it is drawn to the amount for which it is written.

Between drawer and payee.

The same reasons of good faith and security in business transactions which induce the law to sustain a *bona fide* sale of property, or assignment of bills or notes, against a subsequent assignee in insolvency of the assignor, apply to the case of a check.

A vast amount of business is done by checks. It would not be good faith in the drawer to withdraw his funds after giving the check, and it is elementary law that, in an assignment for the benefit of creditors,[1] the latter have no greater rights than the assignor except in case of an illegal transfer.

[1] 495. Gardner *v.* National City Bank, 39 Ohio St. 600; First National Bank of Cincinnati *v.* Coates, 3 McCrary, 9; In re Brown, 2 Story C. C. 502; and see Spain *v.* Hamilton's Administrator, 1 Wall. 604, 624; German Savings Institute *v.* Adae, 8 Fed. Rep. 106; Wheatley *v.* Strobe, 12 Cal. 97; National Exchange Bank *v.* McLoon, 73 Me. 498; 1 Story Eq. Jur. 1044; Coates *v.* First National Bank, 91 N. Y. 20; First National Bank *v.* Coates, 8 Fed. Rep. 540; Hall *v.* City of Buffalo, 1 Keyes, 193; Ballou *v.* Boland, 14 Hun, 355; Lett *v.* Morris, Sim. 607; McWilliams *v.* Webb, 32 Iowa, 577; Moore *v.* Lowrey, 25 Iowa, 336; First National Bank *v.* D. & S. Co., 52 Iowa, 378; County of Des Moines *v.* Hinkley, 62 Iowa, 637; Burn *v.* Carvalho, 4 My. & Cr. 690; Rodick *v.* Gaudell, 1 De Gex, M. & G. 763; Robinson *v.* Hawksford, 9 Q. B. 52; Keene *v.* Beard, 8 C. B. N. S. 372.

[1] § 496. An assignee in an assignment for the benefit of creditors stands in the shoes of the assignor, and neither he nor the creditors he

§ 497. That as between a check-holder, H., and the holder, D., of a check subsequently drawn, but presented and paid before H. makes presentment, if D. were a *bona fide* holder for value without notice, his equity and right would be superior to that of H., just as in case of a subsequent mortgage, recorded before its predecessor. And the bank also must be protected; for when a check is presented it is the bank's duty to pay, if it has sufficient unincumbered funds, and it cannot be bound by matters of fact of which it had no notice.

Between one holder and another.

These rules are necessary to the protection of business. Acts must be sustained that are *bona fide* done in the exercise of reasonable care and foresight, or the foundation of financial prosperity will be shaken.

§ 498. That as between H. and the creditors of the drawee bank, if the latter is insolvent before presentment of the check for payment, H. cannot claim a preference. The check can do no more than make the bank a debtor to H. instead of to the drawer, and H. would take with the other creditors. But if the check is presented for payment and refused, we think, —

Between holder and creditors of drawee bank.

§ 499. That as between the bank and the holder presentment for payment works a transfer of the fund. If the unincumbered funds in its possession are sufficient, and this fact is within the knowledge attainable by the bank with reasonable diligence, it is the *duty of the bank to pay the check;*

represents are purchasers for value without notice, but are subject to all equitable liens and transfers. Burrill on Assignments, 481; Roberts *v.* Corbin, 26 Iowa, 327.

It is a general principle, that, whenever there is a legal or equitable assignment before service of attachment on the debtor, or of garnishee process, and the assignee gives notice before judgment is rendered for the attachment or garnishee creditor, the assignee will have priority, even though the debtor or holder of the garnisheed fund had no notice of the assignment before the process was served, and if he did have such previous notice the same rule holds of course. Giddings *v.* Coleman, 12 N. H. 153; Maher *v.* Brown, 2 La. 492; Anderson *v.* De Soer, 6 Grat. 364; Legro *v.* Staples, 16 Me. 252; Adams *v.* Robinson, 1 Pick. 461; Colt *v.* Ives, 31 Conn. 25.

Between bank and holder.

it is bad faith on its part, or negligence not to do it, and the check-holder is directly injured by its wrongful conduct; what more does the law require as the basis for a right of action? These are the elements that underlie all civil liability, — conduct detrimental to the community, and damage to an innocent individual directly resulting from it. And whenever it can be done without an expense, or other counter injustice, greater than that to be remedied, the law should step in. Analyze all the cases in the books, of contract or tort, and you will find in the crucible at last only these two bases of legal chemistry. And in the matter before us they are clearly present; the detrimental conduct is all on one side, and there is no mingling of causes and effects, and no intricate and expensive inquiry necessary to discover the path of justice; there is nothing to hinder the application of the law to remedy the wrong. Bad faith and negligence are injurious to society as well as to the individual, and the law everywhere seeks to repress them and throw the loss they occasion upon the shoulders of their possessors. Everywhere also it should be the object of the law to save litigation, by allowing the real party interested to sue the one finally responsible, in tort or in contract as may be convenient; for since the law implies contract obligations wherever it deems them necessary for the cause of justice, the line between the two kinds of liability is very shadowy, and historically many of the branches on each side drew life from the same root. Legal analogies are plenty and forcible. B. writes, "I promise to pay D. or order $100 on demand." D. orders the money paid to H.; it is perfectly clear that H. can sue B. if he refuses to pay according to his promise. B. has in fact promised to pay H., for he engaged to pay to whomsoever D. should order, and H. is D.'s order. Now a bank receiving $100 on general deposit impliedly promises (by the universal understanding of trade as ascertained in innumerable and unbroken decisions) to pay that money to the depositor, or such persons, and in such amounts, as he may order.

Where, then, is the difference between the position of the holder of a check and the indorsee of a note? The amount

is fixed in the note from the start; in the check, however, B. only says you must not go beyond your deposit, but you may fill in the check for a less amount if you wish, and I will pay it; that is a promise to pay the amount of a properly drawn check, just as truly as a note is a promise to pay the amount named in it. As soon as the check is drawn and presented, the promise takes effect on the definite amount. The only other difference is that one promise is in writing and the other verbal or tacit; but this can make no substantial difference, except as opening the door to the fraud of a depositor who draws more than one check against the same money, and this can never affect the bank, as its promise and duty are only to pay checks as they are presented. It is a general rule[1] of law, that, if a promise is made by B. to D. for the

[1] § 499. (*a*) If A. pays money to B. for C., the latter may sue B. Farmer *v.* Russell, 1 B. & P. 296; Carnegie *v.* Morrison, 2 Met. 402; Arnold *v.* Lyman, 17 Mass. 400; 2 Green. Evid. 109; and see Abbott's powerful dissent in National Bank *v.* Eliot Bank, 20 Law Rep. 138, which was approved in Fogarties *v.* State Bank, 12 Rich. (S. C.) 518.

(*b*) B., by accepting money to pay to C., impliedly promises to do so. And C. may sue as the real party in interest, and the one damnified by breach of the promise, and the same rule holds although C. remains to be designated at a future time. Weston *v.* Barker, 12 Johns. 276; Fenner *v.* Meares, 2 W. Bl. 1269.

(*c*) Where A., being in debt to B., put a bill of exchange in bank to collect and pay B., it was held that B. could sue the bank, for the promise implied was for the benefit of B., and, though not privy to the consideration, he could sue. Delaware & Hudson Canal Co. *v.* The Westchester County Bank, 4 Denio, 97, quoting many cases.

(*d*) In Brewer *v.* Dyer, 7 Cush. 340, the court say that, where one for value engages with another to do some act for the benefit of a third, the latter may sue for the breach.

In Carr *v.* National Security Bank, 107 Mass. 48, it is said that the general rule is, that C. cannot sue on B.'s promise to A. for C.'s benefit when no consideration moves from C., and the exception which holds B. when funds have been put in his hands to pay the creditors of A. has not been extended to cases where neither the creditors nor the amounts of their debts are ascertained. (This, as we have seen in (*b*), is not wholly true.)

In Mellen *v.* Whipple, 1 Gray, 321, the court endeavors to distinguish Brewer *v.* Dyer, but there is no real difference in principle. The learned

benefit of H., the latter can sue B. for the breach. From this principle also results, as a corollary, the right of a check-holder to sue the bank.

judge names several classes of exceptions to the rule that the consideration must move from the plaintiff: —

1st. In case of money had and received, where assumpsit is maintained because the defendant has in his hands money which in equity and good conscience belongs to the plaintiff. Exchange Bank *v.* Rice, 107 Mass. 37; Tweddle *v.* Atkinson, 30 L. J. Q. B. 265.

2d. Cases in which the nearness of relation of the plaintiff to the promisee may have been the ground of decision, as the court thinks. As in Dutton *v.* Poole, 1 Vent. 318, where the defendant promised a father, who was about to fell timber to raise a portion for his daughter, that, if he would forbear, the defendant would pay the daughter $1,000, and an action was sustained by the daughter.

3d. Such cases as Brewer *v.* Dyer, 7 Cush. 337, where D. promised A., the lessee of a shop, to pay the rent to L., the landlord of A. L. recovered from D. the rent for the time of the lease *after* D. left the premises. Now in this case D. had no money of L.'s, nor had he received a benefit for which he must account, nor had L. lost anything, for there was nothing to show that the rent could not be collected of the lessee. It was a clear holding that, where D. promises A. to pay L., the latter, who is the real party in interest, can sue on the contract. Such an *arrangement brings the end parties together and saves litigation,* which is rightly one of the great aims of the law.

In 1 Gray, after speaking of these cases, the court remarks that it will not extend the exceptions beyond the decided cases. But it is the spirit and principle of those cases that should be looked to, and not precise identity of facts, and certainly the money of a depositor in equity and good conscience belongs to the check-holder on presentation of the check, and the holder is the real party in interest, and litigation may be saved by allowing him to sue the bank directly.

The decision of Chief Justice Shaw in Carnegie *v.* Morrison, 2 Met. 396 (1841), is so clear and forcible that we quote a couple of pages from it. The holding was, that, if A. promises to accept a bill of exchange drawn by B., a third party, C., though he cannot sue A. as acceptor, may nevertheless maintain an action against him on the promise to B.

"The objection to such an action and the ground of this defence are, that the immediate parties to the transaction were Bradford on the one side, and the defendants on the other; that to this transaction the plaintiffs were strangers; and that as Bradford acquired some right under it, and had a remedy upon it against the defendants, their contract must be deemed to be made with him, and not with the plaintiffs. But this position presupposes that the same instrument may not constitute a contract

§ 500. Suppose the drawer fails after the bank's refusal to pay the holder, and he loses half the amount of it, or suppose,

between the original parties, and also between one or both of them and others, who may subsequently assent to and become interested in its execution; an assumption quite too broad and unlimited, which the law does not warrant. In a common bill of exchange, the drawer contracts with the payee that the drawee will accept the bill; with the drawee, that if he does accept and pay the bill, he, the drawer, will allow the amount in account if he has funds in the drawee's hands; otherwise, that he will reimburse him the amount thus paid; he also contracts with any person who may become indorsee, that he will pay him the amount if the drawee does not accept and pay the bill."

The bill in this case was as follows: —

"'Whereas John Bradford is indebted to Messrs. Carnegie & Co., of Gottenburg, in the sum of £3,000, and has requested us to pay them that amount for him, by means of bills of exchange to be drawn on us at London, we hereby, for value received of him for that purpose, to our satisfaction, promise to accept their bills to that amount, payable to themselves or their order, and pay them accordingly.' . . .

"The question is, supposing a general failure in the performance of this undertaking, who is entitled to a remedy for such breach, and by what law shall this question be determined? The assurance or promise is in terms made to Bradford; but the substantial benefit to be derived from the performance of it would be the plaintiffs', and therefore they are damnified by the breach. Bradford had procured the defendants to pay his debt for him to the plaintiffs for a satisfactory pecuniary consideration, and immediately gave notice thereof, and remitted the contract to the plaintiffs, who assented to and accepted it. It may be fairly presumed that, but for this transaction, Bradford would have adopted some other mode of remittance. . . .

"It seems to have been regarded as a settled point, ever since reports have been published in this State, rather than as an open question to be discussed and considered. The position is, *that when one person, for a valuable consideration, engages with another by simple contract to do some act for the benefit of a third, the latter, who would enjoy the benefit of the act, may maintain an action for the breach of such engagement.*

"In Felton *v.* Dickinson, 10 Mass. 287, the case was, that a father made a special agreement with a person for the employment of his son till twenty-one years old; whereupon the employer promised to pay the son $200 when he should come of age. The promise was in terms to the father; but being for the benefit of the son, it was held that the son might maintain an action upon it. Perhaps the relation of father and son might have had some influence, and been supposed to bring the case more exactly within the principle of the familiar case of Dutton *v.* Poole,

after refusal, the drawer checks out the money himself and absconds, or is found to be utterly worthless; the holder

1 Vent. 318. But the position is laid down broadly by the court, in general terms, that where a promise is made to one for the benefit of another, he for whose benefit it is made may bring an action for the breach of it. And this position is supported by a citation from Comyns's Digest and Rolle's Abridgment.

"Hall *v.* Marston, 17 Mass. 575, is a leading and decisive case for the proposition, that where one receives money from another, to the use of a third, the latter may maintain an action for it, though there has been no communication between the depositary and the person for whom it was received, and no assent on the part of the party receiving it to pay it over, except that which is to be implied from the act of receiving it with such direction. . . .

"A case directly in point, in support of the general proposition, is that of Arnold *v.* Lyman, 17 Mass. 400. A debtor, in failing circumstances, placed property, consisting of securities and goods, in the hands of the defendant, and took from him a written agreement, reciting such deposit, and promising to pay certain debts enumerated, and amongst them that of the plaintiff. After an able argument for the defendant, it was decided that the action was maintainable. The court considered that the consideration was good, although it moved from the debtor of the plaintiff and not from the plaintiff himself; and although the debtor might have maintained an action upon this promise, had he been compelled to pay his debt to the plaintiff, yet the plaintiff might maintain an action in the first instance, if he elected to affirm the act done in his behalf by the debtor, and avail himself of the promise of the defendant, made for his benefit. The court affirm the general proposition, that he for whose interest a promise is made may maintain an action upon it, although the promise be made to another and not to himself. There are several other cases in which this doctrine is recognized." (pp. 400-403.)

The general tendency of American authority is to hold that, when one makes a promise to another for the benefit of a third, the latter may sue upon it, although the consideration does not move from him. Bohanan *v.* Pope, 42 Me. 93; Beers *v.* Robinson, 9 Pa. St. 229; Brown *v.* O'Brien, 1 Rich. 268; Barker *v.* Bradley, 42 N. Y. 316; Crocker *v.* Higgins, 7 Conn. 347; Brewer *v.* Dyer, 7 Cush. 337; Barrington *v.* Warden, 12 Cal. 311. And the promise will be implied where a legal duty to pay exists. Ross *v.* Curtis, 30 Barb. 238.

In 100 Ind. 515, the court said that a promise upon a good consideration, made for the benefit of third parties, may be taken advantage of and enforced in equity by such third parties, is well settled. And the fact that at the time the promise is made the third parties are not aware of it, and they, and the amount of their claims against the promisee are un-

loses the whole value of the check by reason of conduct on the part of the bank which all the cases agree in condemning as wrongful and contrary to its duty. What must we think of a system of law that claims as one of its fundamental maxims, "Wherever there is a right there is a remedy," and proclaims that for every injury the law will give redress, and yet denies the right of the check-holder to sue the drawee?

We hope that it will not be many years before it will cease to be possible to find this blot on the common law. No amount of deciding in the United States Supreme Court, nor in any other chamber of wisdom, can make the unjust just, and as surely as the Dred Scott decision is dead, so surely will the decision in the National Bank of the Republic *v.* Millard die, with the judges who rendered it.

§ 501. It has been held that, as between the drawer and the bank, payment in good faith upon a genuine check should be sustained, even if the drawer countermanded the payment. If the drawer names a reason legally sufficient to prevent the check's payment, it would be of course but ordinary prudence for the bank to satisfy itself upon the right of the holder before making payment; for example, in case of a check payable to bearer, lost or stolen. But a mere countermand without good cause is a fraud on the part of the drawer, and ought perhaps to be no authority to the bank to sustain him in his fraudulent conduct, though it may be doubted

Between drawer and bank.

known to the promisor, makes no difference under the decisions of this and other courts. For want of privity of contract between the promisor and such third parties, such contracts could not be enforced under the common law. We cite some of the cases: Bird *v.* Lanius, 7 Ind. 615; Hardy *v.* Blazer, 29 Ind. 226, and cases there cited; Devol *v.* McIntosh, 23 Ind. 529; Durham *v.* Bischof, 47 Ind. 211; Fisher *v.* Willmoth, 68 Ind. 449; Miller *v.* Billingsly, 41 Ind. 489. It should be noted that in these cases, except perhaps one in which work was done on the faith of the promise, the claims of the third parties were in existence when the promise was made. Loeb *v.* Weis, 64 Ind. 285; Beers *v.* Robinson, 9 Pa. St. 229. And so promissory notes and bills of exchange under some circumstances, and checks where the holder is entitled to fill a blank with the name of the payee, are exceptions to the common law rule as to privity of contract. In such cases, of course, the payee is not known at the time the check is issued. 2 Whart. Con., § 795.

if it is not going a little too far to hold that the bank must disobey the order of the depositor. It would seem enough if it pays on presentment when there is no countermand, and if there is one, it is a matter between the drawer and holder as to its rightfulness. To be sure, he may accomplish the same purpose by checking out the money, and it would seem clear that, if the bank had no notice of the check outstanding, it could not be held responsible for intermediate paying out of the money upon an order valid on its face.

Question when the bank has notice of an outstanding unpresented check.

The question whether, if the bank has notice of a check (A.) outstanding, it is to be held in case of paying checks, presented previous to A. though drawn subsequently, would seem properly answerable in the negative, unless perhaps when the check of which it has notice *is more than a check*, and constitutes an assignment of the whole deposit, so that the depositor has no right to draw any further checks upon it. It may be said that the depositor has no right to draw after checks at any time so as to diminish the deposit to such an extent as to bring it below the outstanding check, and this is true; but on the other hand, in the light of usage and reason, the bank does not agree, and cannot be expected, to keep track of all the checks that may for any length of time be outstanding all over the country. It seems enough if it does its own duty by paying checks as they are presented, without having to keep extensive additional and inconvenient accounts simply to guard against the fraud of the drawer.

It would seem the only rule well adapted to secure certainty and despatch in commercial transactions, to hold that, before actual presentation of a check to the bank for payment (or certification if the bank chooses to certify), the holder should rest upon the faith of the drawer alone, but that presentment should be held to bring the bank and holder into that position contemplated by the bank in its agreement to pay the person named in an order from the depositor. At this point the person and the sum to be paid become definite to the knowledge of the bank; it has an opportunity to see if the order is genuine, and if it is, the promise of the bank at

the reception of the deposit attaches upon the facts, and renders the bank liable to the check-holder.

§ 502. When we come to consider the opposition to these views it is well to note first the causes of the confusion that exists on this question. If one were to say, Some animals walk on four legs, — a man is an animal, therefore a man walks on four legs, — no one would be deceived for a moment by the fallacy; yet a very similar *non sequitur* lies at the basis of the New York rule on the holder's rights. A check is a bill of exchange; bills of exchange (i. e. some bills of exchange, those which have been before the courts on this question) are clearly not an assignment, and do not give the holder any right to sue the drawee until acceptance, or until the amount is charged up to the drawer, unless drawn upon a specific designated fund; and therefore a check does not operate as an assignment except under the same circumstances. Fallacy in the negative.

Here we have the same fallacy, for although checks constitute a species of the genus bills of exchange, they differ from *other* bills in precisely those characteristics from which the above consequences flow. A bill ordinary does not purport to be drawn against funds, the drawee does not hold money on purpose that it may be drawn against in parcels, he has made no promise express or implied to pay such orders, and it follows of course that no right accrues against him till he accepts; but a check is precisely opposite in these respects, and it would seem from this fact alone that the legal consequence should be opposite. This confusion of thought is further shown by the frequent quotation of cases[1] involving bills of exchange proper, or orders on an individual not a banker, in support of the New York rule.

§ 503. Second, the trouble has been augmented by quoting as authority the overflow of judges in cases where the real

[1] § 502. Mandeville *v.* Welch, 5 Wheat. 277 (bill of exchange), checks excepted by the language of the court. Grinnell *v.* Suydam, 3 Sandf. 133; New York Bank *v.* Gibson, 5 Duer, 574 (1856); Cowperthwaite *v.* Sheffield, 3 Comst. 243 (1860), all bills of exchange; and Luff *v.* Pope, 5 Hill, 413 (order on an individual).

Building upon authorities not to the point.

question did not arise. As in Chapman *v.* White, wherein a decision perfectly just on the facts was rendered, but, as is so often the case, the court laid down very broad propositions, perfectly true so far as they applied to the facts of the case at bar, but capable of many other applications perhaps entirely unthought of by the judge, and certainly not weighed as they would have been if the case had involved them; yet these broad statements are taken up by subsequent judges, and, to save the trouble of thinking, are made the basis for judgments that the originator of the cited principle would very likely repudiate.

§ 504. Third. Some conflict has arisen by reason of the differences in the *breadth* of view taken by different judges. For

Too narrow a view.

example, when a question arises between the holder of a check and the creditors of the drawer under an insolvent assignment subsequent to the check, if the attention is confined to the parties in this one transaction, it may be difficult to see how the holder has a better equity than the creditors. Each has trusted the drawer, each has given value, and why should not each bear his share of the loss? But if the effect upon commercial life of subjecting checks to this uncertainty be considered, it appears at once that justice to social prosperity requires that the check-holder shall be preferred, just as the transferee of a note or bill, or of any other property or representative thereof.

§ 505. Fourth. Another source of confusion has been the failure to distinguish between the time prior to presentment

Failure to draw the line at presentment.

and the time after. It is perfectly true that a check works no instant assignment as to the bank. But from this it does not follow that a new and different set of obligations may not be created by the facts of a proper presentment and demand made by the payee or bearer upon the bank. An altered condition of circumstances will call for an altered condition of legal relationship and obligation. Obviously, if the usage of banking entitles the holder to payment upon presentment and demand, it is no answer to say that before presentment and demand he had acquired no title to the money as assignee.

§ 506. Fifth. The argument usually relied on, especially in New York and in the United States Supreme Court, is that there is no privity between the bank and the holder, the agreement being between the bank and the depositor. This objection cannot be conceded any weight at all, for privity is a thing the law manufactures whenever it sees fit;[1] if it were not so, much of the law under the head of implied contracts would not exist. Moreover, it is very clear that there is a privity between the bank and holder established by the promise of the bank to pay whomsoever the depositor may designate, which promise is implied from the usage of business. (See § 499, n. 1.) Again, it is well established that a chose in action, or a part of it, may be assigned;[2] and this

Privity.

[1] § 506. The principle is elementary, that, where one receives money for another, and the law makes it the duty of the person receiving it to pay it over to him for whose use it was received, a promise to pay it in accordance with the duty is always presumed, and *a privity established as matter of law between the parties*. Ross *v.* Curtis, 30 Barb. 238 (1859).

[2] At common law a chose in action could not be assigned, as it was considered to tend to the increase of litigation and to oppression, by putting claims (perhaps inequitable ones) in the hands of the rich and powerful. But equity soon began to allow the transferee to sue if he had a real justice, and as a part of this doctrine it is now perfectly settled, that if "B., as a depositary or otherwise, holds a specific sum of money which he is bound to pay to A., and if A. agrees with C. that the money shall be paid to C., or assigns it to C., or gives to C. an order upon B. for the money, the agreement, assignment, or order creates an equitable interest or property in the fund in favor of the assignee C., and it is not necessary that B. should consent or promise to hold it for or pay it to such assignee." Pomeroy, Eq., § 1280, and cases cited.

Equity recognizes an interest in the fund, in the nature of an equitable property obtained through the assignment, or the order which operates as an assignment, and permits such interest to be enforced by an action, even though the debtor or depositary has not assented to the transfer. And it is also clear, that in *equity* a part of a chose in action may be assigned, and there is no doubt that such an assignment will be upheld and enforced whether the debtor has assented or not, — though at *law* the depositary has a right to demand that the debt shall not be assigned in parcels, since it is due as a whole, and it may inconvenience him to have it split up and the matter subjected perhaps to several suits, but this of course would not apply if the depositary had agreed that the debt might be assigned in parts. McFadden *v.* Wilson, 96 Ind. 253, and cases there

once conceded, the argument of want of privity between the assignee and the debtor or holder of the fund is disposed of under the equitable and statutory rules. If, by the assignment, the assignee acquires a legal right, it is by force of the statute, without regard to the assent of the debtor or holder of the fund. If he acquires an equitable assignment and right simply under the rules in equity, this right is independent of any assent by the debtor or holder of the fund.

§ 507. Sixth. The objection that the bank is liable to a double action if both the drawer and the holder are able to maintain a suit, seems entitled to little or no weight. If by its wrongful act the bank has done to each one of these two persons a separate and distinct injury, there is no reason why it should not make compensation to each. If it has injured the drawer's credit by its wrongful refusal to honor his check, it should be liable in damages. If it has caused a direct

Double action.

cited; Wood *v.* Wallace, 24 Ind. 226; Pomeroy, Eq., § 1270 *et seq.*, and cases there cited.

In Story's Equity Jurisprudence, § 1044, it is said, after stating the rule at law: "But in cases of this sort the transaction will have a very different operation in equity. Thus, for instance, if A., having a debt due to him from B. should order it to be paid to C., the order would amount in equity to an assignment of the debt, and would be enforced in equity, although the debtor had not assented thereto. The same principle would apply to the case of an assignment of a part of such debt. In each case a trust would be created in favor of the equitable assignee of the fund, and would constitute an equitable lien upon it."

Where there is an intention of the drawer and payee that a fund or chose in action, or a part of either, shall be assigned, the assignment may be effected by an order, bill, or check. In such case the intention controls, and will be given effect by the courts. It is upon this principle that an order upon the whole of a special fund operates as an assignment. See Pomeroy, Eq., § 1280 *et seq.*, and cases there cited; Bispham, Prin. of Eq., pp. 219, 220, and cases there cited.

Says Mr. Pomeroy, "What shall amount to the present appropriation which constitutes an equitable assignment, is a question of intention, to be gathered from all the language construed in the light of the surrounding circumstances." Pomeroy, Eq., § 1282. So it is said by the same author, in the latter portion of section 1281 of the same work, "*A check may undoubtedly operate in this manner as an equitable assignment, when it is so drawn as to show an unmistakable intention of the drawer to transfer his*

loss to the payee by refusing to give him the money which it ought to have given him, there seems no reason why it should not recoup him. The holder of an unpaid check may have recourse against the drawer; but suppose that, after the wrongful refusal to pay and before this recourse can be made effectual, some circumstance (as, for example, the drawer's bankruptcy) should intervene and make this recourse practically useless, then the holder loses his money; the bank is to blame, it has caused the loss, by acting in defiance of its acknowledged duty, of the purpose for which it received its corporate privileges, of the universal custom and usage of the banking business; and yet, as the law probably stands at present, the holder has no remedy against the bank, though it has wilfully and seriously injured him. A good example of the hardship and injustice which would be wrought by a rigid enforcement of the rule denying to the check-holder a right of action under any circumstances is to be found in Fourth National

exact deposit in the bank to the payee." See also Kingman *v.* Perkins, 105 Mass. 111; Macomber *v.* Doane, 2 Allen, 541. In the case of Kahnweiler *v.* Anderson, 78 N. C. 133, it was said that the intention to assign, founded upon a consideration, and expressed by a bill or draft, operates as an equitable assignment. In the case of Bank of Commerce *v.* Bogy, 44 Mo. 15, it was said that the drawing of a bill of exchange does not, of itself, operate as an equitable assignment of the debt, but is evidence tending to show such an assignment; that anything that shows an intention on the one side to make an irrevocable transfer of the debt or fund, and from which an assent to receive it may be inferred, will operate in equity as an assignment.

At law, the right to sue upon the equity of assignment was early given, in order to save the plaintiff the expense of going to chancery, but the action had to be in the name of the assignor; this, however, is by statute changed in many States, and the law brought up abreast of equity.

In the following States all choses in action arising on contract are assignable, and in the first seven the assignee may sue in his own name: Maine, New York, Indiana, Michigan, Texas, Florida, Alabama; Minnesota, Kansas, North Carolina, Tennessee, Arkansas, California, and Georgia; also in New Mexico and Arizona Territories.

In the following States and Territories the assignee can sue in his own name, so far as choses in action are assignable, which is in varying degree: Connecticut, New Jersey, Pennsylvania, Nebraska, Maryland, Delaware, Virginia, West Virginia, Mississippi, Washington and Idaho Territories.

Bank of Chicago *v.* City National Bank of Grand Rapids, 68 Ill. 398.

Parties are often liable to different suitors for one wrongful act, a trespasser may be liable to the tenant and to the reversioner, and one promising to discharge an incumbrance may be liable for his failure to the promisee and also to the holder of the incumbrance. (See § 499, n. 1.) The action by the holder would be for the amount of the check; that by the drawer for the dishonor of his order is not for the amount of the check, but for the injury done to his credit.[1]

§ 508. Seventh. It is objected in Massachusetts, that "The holder of the check cannot take advantage of the implied promise to pay the depositor's checks, because, at the time the deposit is made, neither the name of the holder nor the amount of his check is known." But this is only an illustration of the failure above noted to recognize the act of presentment as the line of the bank's liability. At presentment the name of the holder and the amount of his check become known, and it is not claimed that the bank is liable before presentment.

§ 509. Eighth. It is said that if the bank is liable to the holder it must pay, although the drawer has countermanded the check, and thus involve itself in difficulties. This, however, does not follow as a necessity, and it is questionable how far it is proper to compel the bank to look into the right between the drawer and holder. Little trouble could arise if a uniform and well understood rule were established either way as to countermand; but it would seem safest and best to rule that the bank should hold the money until the holder and drawer had settled the matter between themselves, at law, by compromise, or otherwise, and that the bank should not be harassed by suits in such cases where the real question is between other parties.

§ 510. Ninth. In 100 Indiana Reports it is said that, in the absence of any evidence except what the check furnishes, it must be presumed that the payee takes the check upon the credit of the drawer, and the

No words of transfer.

[1] § 507. Whitaker *v.* Bank of England, 6 C. & P. 700; Marzetti *v.* Williams, 1 Barn. & Ad. 415; Rolin *v.* Seward, 14 C. B. 595.

court bases its decision chiefly on the ground that a check contains no words of transfer, and is not sufficient evidence of an intent to transfer the fund. Now it is well understood that it is a fraud to draw a check without funds as a basis for it, and this is not consistent with any view except that the payee takes the check on faith of the funds in the hands of the bank, as well as on faith of the drawer in case of the bank's refusal or insolvency. It is not necessary that negotiable paper should be taken on the faith reposed in one person alone. After all, the real question is simply this: What construction of a check consistent with the usages of business is best calculated to advance justice, and secure good faith and the convenient despatch of business? And it seems to us that the answer in Bank of the Republic *v.* Millard is not the true one, but a sliding out from under the question on a technical plank.

Special Facts that may influence the Decision, taking the Case out of the General Problem.

§ 511. (*a*) An order to pay a debt out of a particular designated fund is an equitable assignment.[1] Though an ordinary bill of exchange or check is not an assignment, yet if a particular fund is specified out of which the amount is payable, the depositary after notice must keep the fund as a special deposit, for the benefit of the payee,[2] and no acceptance by the debtor is necessary in equity.[3] Designated fund.

(*b*) Also if the bank charges the drawer of a check with the amount of it, the holder can sue the bank in assumpsit for money had and received. These exceptions are recognized in the cases, which deny in general that a check is an assignment, or gives the holder any right of action against the drawee.[4] Where a depositor settling with the bank left the exact amount of an outstanding Charging the drawer.

[1] § 511. Bradley *v.* Root, 5 Paige, 632; 1 Parsons on Bills and Notes, 336, ed. 1863.

[2] Ballou *v.* Boland, 14 Hun, 359.

[3] Kirtland *v.* Moore, 40 N. J. Eq. 106.

[4] National Bank of the Republic *v.* Millard, 10 Wall. 152.

check expressly for its payment, this was of course held to make the bank liable to the holder, as on an implied acceptance.[5]

(*c*) A debt or part of it may be assigned even orally by agreement on sufficient consideration; and although an ordinary check is not proof of such an assignment of itself, yet, if the assignment is properly proved, the assignee can sue the holder of the fund or debtor, and in many States the action may be in his own name.[6] If there are words of transfer in the check, or the intent of the parties to transfer the debt is clear, it will sustain a suit without assent of the depositary if the *whole* debt is transferred. If only part, the same rule holds in equity, though at law the consent of the depositary is necessary.[7]

Words of transfer.

Where a depositor in a bank drew a check reciting on its face that it was to take up certain notes of his held by the bank, and handed it in to the bank, it was held an appropriation of so much of his deposit as it called for, operative from the time of presentment, and effecting a payment of the notes.[8]

(*d*) It has never been questioned that where the bank has by an act, as for example certification, come under a distinct, independent original obligation to whomsoever may be the owner of the check, then such owner may recover the amount in a suit brought in his own name directly against the bank. Some curious developments from this rule have taken place. Thus, where a check is made payable to order, if the bank pays it to a wrongful holder upon the strength of a forged indorsement, and charges the drawer with the amount thereof in account, it thereby agrees to honor the check, undertakes to pay it to the payee or indorsee, becomes

Acceptance.

[5] Saylor *v.* Bushong, 100 Pa. St. 23 (1882). So where a check drawn to C. was paid to B. on his forgery of C.'s name, and the bank charged it up to the drawer, this was held an acceptance, and C. recovered of the bank. Seventh National Bank *v.* Cook, 73 Pa. St. 483.

[6] Risley *v.* Phœnix Bank, 83 N. Y. 318. See § 506, n. 2.

[7] See Harrison, Rec., *v.* Wright, 100 Ind. 515, and note on Assignment.

[8] Laubach *v.* Leibert, 87 Pa. St. 55.

the agent of such payee or indorsee, holds the amount for him, and is bound to pay it to him. But in fact, by paying the amount to a person who is not the payee nor the indorsee and owner under a genuine indorsement, the bank does not acquit itself of these obligations, which still remain in full force and effect, and in no way satisfied. The bank is therefore still liable to pay to the real party to whom it owes the money, and whose agent and debtor it really is. Such party may sue the bank in his own name and recover the full amount of the check.[9] But there is some discrepancy in the language of the cases cited as to whether this rule would apply where the bank has paid the check erroneously, but has not charged the drawer. Even under such circumstances the Louisiana and Ohio cases would seem to sustain the foregoing doctrine; but the case in Wallace is directly to the contrary.

(*e*) So also it has been held that if the bank makes an express promise to pay the checks of a certain depositor, which promise is communicated to a third party, who upon the strength of that promise receives such checks, parting with value therefor, then he may, as holder, maintain his action against the bank. The promise, having been brought to the knowledge of the payee, (in this case by the statement made to him both by the drawer and by a director of a bank,) creates a privity between the drawee and the payee which the court say would otherwise have been wanting.[10]

Estoppel. Promise of bank known to payee before he became holder and acted on.

(*f*) As to the bank, it is clear justice that the assignment (M.) should have no effect until notice; for if a check (N.) subsequently drawn be presented before M. the bank must be protected in paying N.;[11] and so if a bank pays the money it holds to a receiver before it has notice of a check against the fund, it is blameless, and the question lies between the

[9] Vanbibber *v.* Bank of Louisiana, 14 La. An. 481; Dodge *v.* National Exchange Bank, 20 Ohio St. 234; Seventh National Bank *v.* Cook, 73 Pa. St. 483; National Bank of the Republic *v.* Millard, 10 Wall. 152.

[10] Nelson *v.* First National Bank, 48 Ill. 36.

[11] See Laclede Bank *v.* Schuler, 120 U. S. 511; Harrison, Rec., *v.* Wright, 100 Ind. 515.

holder and receiver. The equity is a secret one as to the bank until notice.

(*g*) A draft discounted for the whole of a debt, with the account of the debt attached, is held an assignment.[12] See (*c*).

(*h*) In England in case of the death of the drawer (revoking the banker's authority) the holder may have relief in equity against the bank.[13]

(*i*) On July 16, 1874, L. gave a note (due October 13) for $225 to S. S. sold the note at once to the R. Bank. Sept. 16, 1874, L. deposited a draft on Bushy for $292 with the R. Bank for collection; this was paid to the bank, Sept. 30. Sept. 26, L. made an assignment, for creditors. Sept. 29, L. gave H. a check on the R. Bank for $280, dating the check prior to the assignment, viz. Sept. 22. H. took the check to the bank, and requested that it should be used to take up the note first mentioned. The bank attached the check to said note, and at maturity applied the Bushy money to its payment, knowing of the assignment, but not of the antedating of the check. The assignee in insolvency sued the bank for the whole of the Bushy money, and the bank claimed that the check was an absolute assignment, and, as the bank had no notice of the antedating, it must be protected. The court said there was no need to consider whether a check was an absolute assignment or not, *for in this case it was not drawn against funds. The Bushy money was by the act of the 26th assigned before it came into the hands of the bank*, and therefore the assignee must recover.[14]

Ohio. Check not drawn against funds is no assignment.

(*j*) Even though a check may be an assignment, yet if the deposit is simply a credit given the depositor for unpaid drafts given in for collection, the holder cannot recover.[15]

(*k*) In case the bank on which a check is drawn becomes insolvent before the check is paid, of course the check-holder cannot expect a preference to the other creditors of the bank; in no reasonable view can the holder acquire more rights than

[12] Moore *v.* Davis, 57 Mich. 255.

[13] Rodick *v.* Gandelle, 12 Beav. 325.

[14] Chaffee *v.* Bank, 40 Ohio St. 1.

[15] Jacob *v.* First National Bank, 3 Bull 274 (Ham. County Dist. Court).

the depositor would have himself. This is the essence of Chapman *v.* White.[16]

(*l*) If the money is deposited as the check-holder's, although in the drawer's name, and the fact is communicated to the bank before any other right attaches to the fund, it is in equity the money of the holder, and he may recover from the bank.[17]

§ 512. **The Bank as Trustee for the Holder of the Check or Bill.** — An effort has sometimes been made to compel the bank or banker to respond to the demand of the holder of a check or bill, on the ground that money has been specially paid in to the bank or banker, by the debtor, for this specific purpose. But the arguments for such plaintiffs have not been successful.

In New York a case arose as follows. A depositor having a small deposit in the bank sent additional funds for deposit, with the request that the amount should be credited to him on account, and that he should be charged with his note, which was to fall due, payable at the bank, on the following day. The bank received the deposit, gave the depositor credit for it, and then from the sum total of his credit deducted enough to pay an overdue note of his, in their possession, payable at their bank and charged to him. On the following day the note referred to by him in his instructions was presented for payment, and, his balance not being large enough to meet it, payment was refused. The court held that the holder of the note had no right of action against the bank, adopting the reasoning of the cases which deny the check-holder a right of action; viz. want of privity, and the fact that there was no assignment in law.[1] This case was distinguished from Lawrence *v.* Fox.[2] In that case the defendant (D.) received money from the debtor of the plaintiff (P.), for the purpose of paying P., and on an express promise

[16] 2 Seld. 412.

[17] Allen *v.* American National Bank, 3 Lans. 517 (1871). See Hopkinson *v.* Foster, L. R. 19 Eq. 74.

[1] § 512. Ætna National Bank *v.* Fourth National Bank, 46 N. Y. 82. See, for a somewhat similar case, but where the instrument was a check instead of a note, First National Bank of Chicago *v.* Pettit, 41 Ill. 492.

[2] 20 N. Y. 268.

to do so; but in this Ætna case the money was sent to be *credited to account*, and therefore became the property of the bank, and not that of the depositor held in trust; and the court said, that whatever contract might exist between the bank and the depositor as to the payment of checks or notes could not be taken advantage of by the holder, quoting Chapman *v.* White. An effort was made to bring the case under the principle that P. may sue on a promise made to D. for P.'s benefit; but the court remarked (p. 536), that in cases where that rule is applied there is always some trust, or the defendant has been charged for money which *ex æquo et bono* belongs to the plaintiff. It seems to us there was a trust here; the order of the depositor must be taken as a whole, and his fair meaning should be enforced.

In England a similar doctrine was asserted concerning a bill of exchange. The acceptor paid in the amount to his bankers in order to meet the bill, but upon the very day when the bill matured he died, indebted to his bankers upon his general balance. The bankers refused payment. The drawers, having been forced to pay it, brought a bill in equity to compel the bankers to reimburse them, on the ground that they had received money in trust for the purpose of paying the draft. But the court dismissed the bill, on the ground of the want of privity between the plaintiff and defendants.[3] This case was avowedly decided on technical ground, authority and want of privity. The court remarked, that the bank had done wrong, and that the acceptor had a good cause of action, but that no agreement had been made by the bank with the drawers; they were not mentioned in the dealings with the bank, and the only way to make the bank a trustee and hold it accountable to the drawers would be to show that the money in the hands of the bank belonged to the drawers, which clearly was not the case, and therefore, "however strong the merits," there is no privity, and the bill must be dismissed, although the drawers "suffered by the conduct of the bank," and this conduct was "wrong."

One could scarcely imagine a clearer case for the building

[3] Hill *v.* Royds, L. R. 8 Eq. 290; Moore *v.* Bushell, 27 L. J. Ex. 3.

of an addition to the noble temple of Equity than was offered to this judge. If all his predecessors had been as fearful of stepping out of the path worn by the feet of their ancestors, we should be dwelling in caves and eating raw fish. Here was conduct admittedly wrongful, detrimental to the interests of society, contrary to good faith, and a violation of that security and certainty in business transactions so essential to financial prosperity, and there was direct damage to an innocent party consequent upon this wrongful action. What more does equity need? talk of privity, it is a thing the law makes to order whenever occasion exists. Where would be all the law of implied contracts, if every judge had waited for some other to declare a privity in the case? Where would the many-headed action on the case be, if the judges of the earlier centuries had said, "There is a wrong here and damage resulting directly to P., and P. is not himself in fault, and the damage can be easily estimated, — it is a clear case *on the merits*, but there is no authority in the books holding a defendant liable in such a case and we cannot step out of doors"? It is sorrowful to see men imprisoned in the past, and making the thoughts of former times their jailers.

Cases denying that a Check-holder can sue the Bank, or that a Check operates as an Assignment, Legal or Equitable.

§ 513. **United States.**—"A bill of exchange or check is not an equitable assignment *pro tanto* of the funds of the drawer in the hands of the drawee."[1] The question of the check-holder's right of action is answered in the negative by the United States Supreme Court. We cite from the opinion of Justice Davis:[2] "As checks on bankers are in constant use, and have been adopted by the commercial world generally as a substitute for other modes of payment, it is important, for the security of all parties concerned, that there should be no mistake about the status which the holder of a check sustains towards the bank on which it is drawn. It is very clear that

[1] § 513. Christmas *v.* Russell, 14 Wall. 69.

[2] National Bank of the Republic *v.* Millard, 10 Wall. 152. See Rosenthal *v.* Mastin Bank, § 523.

he can sue the drawer if payment is refused; but can he also, in such a state of the case, sue the bank? It is conceded that the depositor can bring assumpsit for the breach of the contract to honor his checks; and if the holder has a similar right, then the anomaly is presented of a right of action upon one promise, for the same thing, existing in two distinct persons at the same time. On principle, there can be no foundation for an action on the part of the holder, unless there is a privity of contract between him and the bank. How can there be such a privity, when the bank owes no duty, and is under no obligation to the holder? The holder takes the check on the credit of the drawer, in the belief that he has funds to meet it, but in no sense can the bank be said to be connected with the transaction. If it were true that there was a privity of contract between the banker and holder when the check was given, the bank would be obliged to pay the check, although the drawer, before it was presented, had countermanded it, and although other checks, drawn after it was issued, but before payment of it was demanded, had exhausted the funds of the depositor. If such a result should follow the giving of checks, it is easy to see that bankers would be compelled to abandon altogether the business of keeping deposit accounts for their customers. If then the bank did not contract with the holder of the check to pay it at the time it was given, how can it be said that it owes any duty to the holder until the check is presented and accepted? The right of the depositor, as it was said by an eminent judge, is a *chose in action*, and his check does not transfer the debt, or give a lien upon it to a third person, without the assent of the depositary. This is a well established principle of law, and is sustained by the English and American decisions. The few cases which assert a contrary doctrine, it would serve no useful purpose to review."

The "few cases" so contemptuously dismissed by his honor might not constitute a very weighty body of authorities; but it was certainly not a just comparison to speak of the one doctrine as "well established" and "sustained by English and American decisions," and of the other doctrine as bolstered

up only by an insignificant array of opinions not worthy of notice. For the "few cases" were directly in point, while of the "English and American decisions," which the court cited as "sustaining" this "well established" doctrine, not a single one is *directly* a precedent: only two are very nearly in point, and of these two one is an English case treating of a bill of exchange; and still another is actually to the contrary purport, so far as it can be considered as bearing upon the question at all.

The judge remarked, that the holder might have a right of action in case the bank had "charged the amount of the check against the drawer," on the principle *ex æquo et bono*. The bank, having communicated its assent to the drawer and taken the money, would hold it for the check-owner as money had and received to his use. And if the check were accepted by the bank, of course the holder could sue upon the acceptance.

If the bank accepts the check, or charges it against the drawer, the holder may perhaps sue.

§ 514. **United States Supreme Court.** — A check is at all events no assignment until notice of it is given to the bank, for until then other checks drawn afterward may be paid, or other assignments of the fund, or part of it, may secure priority by giving prior notice. However the doctrine of equitable assignment "may operate to secure an equitable interest in the fund deposited in the bank to the credit of the drawer after notice to the bank of the check, or presentation to it for payment, — a question which we do not here decide, — we are of opinion that as to the bank itself, the holder of the fund, and its duties and obligations in regard to it, the bank remains unaffected by the execution of such a check until notice has been given to it, or demand made upon it for its payment. . . .

"In the case before us, it is a conceded fact, that, before the bank had any knowledge or notice whatever of the check on which the plaintiff brings this suit, it had received a distinct notification from the drawer of that check that he had made a general assignment for the benefit of his creditors, with an express direction to hold the funds subject to the order of the assignee. Apart from this matter, it is not easy to see any

valid reason why the assignment of an insolvent debtor for the equal benefit of all his creditors, and all his property, does not confer on those creditors an equity equal to that of the holder of an unpaid check upon his banker." [1]

Any order, writing, or act which makes an appropriation of a fund, amounts to an equitable assignment of the fund. The reason is, that, the fund being a matter neither assignable at law nor capable of manual possession, an appropriation of it is all that the nature of the case admits of, and therefore it is held good in a court of equity. As the assignee is generally entitled to all the remedies of the assignor, so he is subject to all the equities between the assignor and his debtor. But in order to perfect his title against the debtor, it is indispensable that the assignee should immediately give notice of the assignment to the debtor, for otherwise a priority of right may be obtained by a subsequent assignee, or the debt may be discharged by a payment to the assignee before such notice.[2]

§ 515. **Alabama. — Check on Bank or Debtor not Assignment of Funds in Hands of Drawee.** — A check, drawn and delivered to the person to whose order it is payable, does not, without acceptance by the drawee, operate as an assignment of the sum in his hands for which it is given; it may be revoked by the drawer, at any time before acceptance, and is revoked by his death; and there being no privity, express or implied, between the payee and the drawee, the former can maintain no action on it against the latter.[1]

§ 516. **England.** — As a general rule, a check is not regarded as an assignment in England.[1]

§ 517. **Indiana.** — In Harrison, Receiver, *v.* Wright,[1] C. and

[1] § 514. Laclede Bank *v.* Schuler, 120 U. S. 511, 515.

[2] Spain *v.* Hamilton's Administrator, 1 Wall. 604, 624.

[1] § 515. National Commercial Bank *v.* Miller, 77 Ala. 168.

[1] § 516. Hopkinson *v.* Foster, L. R. 19 Eq. 74.

[1] § 517. 100 Ind. 515. See also National Bank of Rockville *v.* The Second National Bank of Lafayette, 69 Ind. 480, in which the Massachusetts case of National Bank *v.* Eliot Bank, 20 Law Reporter, 138, is approved, Abbott's dissent being rejected on the ground that, although an express promise to A. for C.'s benefit gives C. a right of action, this is not true of an *implied* promise.

D., holders of checks given by one bank (B.) upon another, before B.'s insolvency, and dishonored because of the failure of B., sued in equity for a preference to the general creditors of B. The form of the check was: "Indianapolis, Ind., —— —, 1883. No. —. Pay to the order of —— ——, —— dollars. —— ——, Cashier. To the United States National Bank, N. Y."

After an elaborate review of the cases, the court held that "Such a check, drawn upon the drawer's banker, without words of transfer, and drawn upon no particular designated fund, does not, of itself, either as between the drawer and drawee, or drawer and payee or holder of the check, operate as an appropriation, or equitable assignment of a fund in the hands of the drawee. Nor does it operate as an assignment of a part of the drawer's chose in action against the drawee, and hence the holder of such a check is not entitled to a preference as against the depositors and general creditors of an insolvent drawer."

The ground upon which the ruling was based is substantially stated in the following extracts (pp. 536, 537): "Strictly speaking, the depositary holds no fund to be appropriated. It owes a debt. The right of the depositor is a chose in action. This or a part of it may be assigned. *When assigned, equity, for the purpose of making good the assignment, seizes upon the debt and calls it a fund. An ordinary check, however, without words of transfer*, and drawn upon no particular fund, does not effect such an assignment. In the absence of evidence, except what the check furnishes, it must be presumed that the payee takes the check upon the credit of the drawer. Many of the cases assert this, and it seems to us reasonable." The court denies the force of the assertion that there is no privity between the check-holder and drawee, and says that the objection made to allowing both drawer and holder an action against the drawee is not well taken, because the two actions are not for the same cause; denies that the uncertainty as to the holder or the amount of the check is any reason to prevent recovery by H. upon a promise made to D. for the benefit of H; affirms that part of a chose in action may be

assigned, and that a check may work an assignment if it contains words of transfer, or is drawn on a particular fund; and does not consider the objection well taken, that, if a check works an assignment, the drawee would be compelled to pay it although the fund were exhausted by subsequent checks, for until proper notice the equity is a secret one as to the bank. After thus knocking the props from under nearly all the cases upon its own side of the controversy, the court cannot see its way clear to allowing that the check-holder may recover, saying: "In the case before us, the checks contain no terms of transfer; they are not drawn upon any particular designated fund, nor is there anything in them, or the circumstances connected with the giving of any of them, that indicates any intention on the part of the drawers or payees that there should be an assignment of anything." How a judge of so clear, wide-reaching, and systematic intelligence could come to the conclusion of the last thirty words, is one of those ever-recurring mysteries in mental gymnastics, which have some other source than thought. In this case it would seem from some remarks of the judge that the real feeling underlying the decision was simply that the payees of the checks had given value, relying on the credit of the drawer bank, B.; the other creditors of B. had done the same; all these persons were equally innocent, and it seemed proper to put them on the same plane. "It is a case where equality among creditors is equity." (p. 544.) And so long as the view is confined to the equity between the parties in a particular case in the past, no note being taken of the effect of the decision upon the future of commercial life, there is some argument to be made for the ruling perhaps; but when a broader view is taken, and such a decision is sought as will most conduce to justice and social welfare in general, the same reason of security in commercial transactions that so greatly favors the despatch of business and the consequent increase of wealth, which applies to sustain transfers of bills and notes and other property, applies also to render a *bona fide* check-holder's title secure against insolvency of the drawer.

§ 518. **In Louisiana** a check is neither an equitable assignment nor a lien, nor has the check-holder any right of action against the drawee.[1]

§ 519. **Maryland.** — A check is not an assignment *pro tanto* until accepted or certified, and the bank cannot be held liable upon it by the payee.[1] The question in this case was between the bank (F.), in which the check on the C. bank was deposited, and the payee (P.), who indorsed it. The F. bank charged the check to the C., the latter refused to pay, and the F. recovered of P. It was not a question between the drawer and payee.

§ 520. **In Massachusetts**[1] the ruling of the United States Supreme Court was approved. An action by a check-holder was based in part upon a special agreement by the bank with the depositor to pay all checks that he might draw upon it to the extent of the fund deposited. It was held that the general agreement of the bank to pay all checks drawn upon it by the depositor could not be taken advantage of by the check-holders as a promise made for their benefit, because, when the promise was made, it was not known who the check-holders would be, nor the amount of the checks they might hold. The bank must have made a direct promise to the holder, by acceptance or otherwise, or the check must be drawn upon a designated fund, or for the whole debt. In other cases, it will be no assignment, legal or equitable.

§ 521. **In Michigan**[1] it was held that, without acceptance by the bank, or some special undertaking on its part, the bank could not be held liable upon a check, even though drawn for the full amount of the deposit. But in a later case a draft discounted for the whole of a debt, with the account of the debt attached, was held an assignment.[2] A banker in Michigan sold a draft or check on a bank in New York, and before

[1] § 518. Case *v.* Henderson, 23 La. 49.

[1] § 519. Moses *v.* Franklin Bank of Baltimore, 34 Md. 574.

[1] § 520. Carr *v.* National Security Bank, 107 Mass. 45. See National Bank *v.* Eliot Bank, 20 Law Reporter, 138.

[1] § 521. Second National Bank *v.* Williams, 13 Mich. 282.

[2] Moore *v.* Davis, 57 Mich. 255.

it was presented for payment made an assignment for the benefit of creditors. Payment was refused by the New York bank on account of the assignment. The action was by the payee of the check, to have the assignee pay the check in full, on the ground that, as between the drawer and payee, it operated as an equitable assignment. It was held by the court, Cooley, C. J. delivering the opinion (Sherwood dissenting), that the payee and holder of the check was not entitled to such preference.[3]

§ 522. **In the Missouri Appeals** it was several times decided that the holder could recover the amount of a check from the drawee bank which has refused payment, though having sufficient funds;[1] and in one case, the fact that suit was not brought on the check till after the drawee bank had settled its claim in bankruptcy against the drawer did not estop the holder.[2] In the Senter case, Justice Hayden says: "We are referred to what is said by Mr. Morse in the second edition of his work on Banking, to the effect that the denial of the holder's right to sue will probably hereafter become the doctrine generally accepted in this country. We are directly of the opposite opinion. The weight of reasoning, we think, is clearly in favor of the holder's right. The contrary doctrine is equivalent to a confession that the law is incompetent to extend well established principles to new cases, as the latter arise from new contracts created by commercial necessities." But when the question came before the Missouri Supreme Court, the authority of the United States Supreme Court was followed, and a check for *part* of the drawer's deposit was declared to be no assignment at law or in equity.[3]

§ 523. **Missouri.** — The Mastin Bank of Kansas City drew a check or draft upon a New York bank, and before it was presented for payment made an assignment for the benefit of

[3] Grammel *v.* Carmer, 55 Mich. 201.

[1] § 522. McGrade *v.* German Savings Institution, 4 Mo. App. 330 (1877); Senter *v.* Continental Bank, 7 Mo. App. 532, 534.

[2] State Savings Association *v.* Boatman's Savings Bank, 11 Mo. App. 292 (1881).

[3] Merchants' National Bank *v.* Coates, 79 Mo. 168.

creditors. The assignee drew the funds from the New York bank. The action was against him to have the check paid in full, on the theory that the check worked an equitable assignment, and hence the assignee held the fund for the use of the holder of the checks. The decision was adverse to this claim, and was based upon the ground that the relation of the depositor and depositary was that of creditor and debtor; and that the check was not for the whole of the fund, nor for any particular fund, and contained no terms of transfer, and hence, before acceptance, did not work an equitable assignment.[1] In a case that grew out of the failure of the same bank, and upon a state of facts in all essentials identical with the facts in the case last above, the same ruling was made by the United States Circuit Court in New York, by Blatchford, J.[2] In reference to these cases it is to be noted that the check in both instances was upon a New York bank. It would therefore be governed by New York law as to its effect, and the settled law of New York prevented the draft from being an assignment. This fact, although not decisive in the United States court upon a question of general commercial law, was yet of great weight.

§ 524. **New York.** — The case of Chapman *v.* White,[1] so often referred to by the cases denying that a check-holder may sue the drawee, or that it operates as an assignment, on close inspection affords no foundation for the structure built upon it. The facts were these. A. made his promissory note, payable at the C. bank on July 12. Shortly before this date he procured from the G. bank, which had a credit on account with the C. bank, a check upon the C. bank, which he forwarded to that bank for the purpose of meeting his note. The check came to the hands of the cashier at the C. bank, July 8. The C. bank failed, July 10. The note was presented there for payment, July 12, when payment was refused. The draft had not been indorsed by the cashier (L.), nor accepted by the bank. The court held that the cashier of the C. bank was

[1] § 523. Dickinson *v.* Coates, 79 Mo. 250.

[2] Rosenthal *v.* Mastin Bank, 17 Blatchf. 318.

[1] § 524. 2 Seld. 412.

the agent of A. for the purpose of procuring the payment of his note by means of this check; that *the circumstances of its receipt by the cashier* operated to effect no assignment of funds in the C. bank in favor of A., and that he had no preferred claim against its assets. In this case, not strictly the bank, *but the cashier, was the agent of A.* The loss fell wholly upon A. For having bought a check from the G. bank, which was still good when it reached the C. bank, he could not of course look to the G. bank for any reimbursement. He took the risk of the solvency of the C. bank during the interval which must elapse before his note ought to have been presented, and also of the accuracy and honesty of the conduct of that bank, or of its cashier, in appropriating the check, or the credit or proceeds which he was entitled to thereupon, to the payment of his note. A miscarriage in any of these risks was his individual loss. These facts do not touch the question of assignment between drawer and payee, nor the question of the holder's right to sue for an improper refusal to pay a check. The money was on general deposit, and A. fared just as well as the drawer himself could have done. As against the other depositors in and creditors of the C. bank, neither the drawer nor his assignee could have any just claim to preference. The fund could not be changed from a general deposit to a specific or trust deposit until notice had been brought home to the bank, and this had not been done by L.; and his notice was not that of the bank, for it was his own case. He was acting as A.'s agent in the matter, not the bank's agent, and even if his notice were held that of the bank, A. would in no proper view have a superior equity. The note was not presented till after the failure.

When we look closely at these facts, and then at the long line of cases tracing their pedigree from it where a check has been ruled to be no assignment between drawer and payee in case of *insolvency, not of the drawee bank, as here, but of the drawer,* and when proper presentment had been made, we are reminded that children are sometimes very unlike their parents; and when we look at that other group of legal opinions in which Chapman *v.* White is quoted as a basis for

ruling that a check-holder cannot sue the drawee for improperly refusing to pay a check although it has sufficient funds, we cannot sing, "How firm a foundation!" However, upon the authority of other cases, there is no doubt that New York refuses to recognize a check as an assignment between drawer and payee, or as sufficient to give any preference against the general creditors of the drawer.[2]

In the Risley case it was held that, although a check is not of *itself* an assignment, not being the contract between the parties, but only a convenient means of carrying out the transfer that may be contemplated, yet since *a debt or a part of it* can *be orally assigned by an agreement on consideration*, on this ground an assignee may sue in his own name: but such assignment must be proved by some evidence beyond that of possession of a check.

A bill of exchange was drawn by a bank on one who had funds to meet it. The bank becoming insolvent, the holder was held to have no right to preference over the other creditors.[3]

§ 525. **New Jersey.** — The holder of a check cannot sue the bank for refusal to pay upon its presentation, though the drawer has sufficient unincumbered funds on deposit at the time of refusal.[1]

§ 526. **In Pennsylvania,**[1] it was held that a check upon a banker is not of itself an appropriation of the funds in his hands belonging to the drawer, unless it plainly appears that the fund claimed was the one designated, out of which payment was to be made.

The holder of a check cannot maintain an action against the drawee for refusal to accept, nor for refusal to pay an unaccepted check.[2] But when a depositor in settling his ac-

[2] People *v.* Merchants,' &c. Bank, 78 N. Y. 269; Ætna National Bank *v.* Fourth National Bank, 46 N. Y. 82; Risley *v.* Phœnix Bank, 83 N. Y. 318. See also Winter *v.* Drury, 1 Seld. 525.

[3] Justh *v.* National Bank, 56 N. Y. 478.

[1] § 525. Creveling *v.* Bloomsburg National Bank, 46 N. J. Law, 255.

[1] § 526. Loyd *v.* McCaffrey, 46 Pa. St. 410.

[2] First National Bank of Northumberland *v.* McMichael, 106 Pa. St. 460; Saylor *v.* Bushong, 100 Pa. St. 23. See § 535.

count with the bank leaves the exact amount of an outstanding check expressly for its payment, the bank is liable to the holder upon these facts as an implied acceptance.[3]

§ 527. **In Tennessee**, the Supreme Court[1] approves of the ruling in Bank of the Republic *v.* Millard.

Cases affirming the Check-holder's Right to sue the Drawee Bank, or announcing the Principles upon which that Doctrine rests.

§ 528. **United States.**—The case of Mandeville *v.* Welch[1] is frequently, but, as it seems, not altogether properly, cited among the authorities which are opposed to the check-holder's right to sue. For it is in this very case that the court touches for the first time the key-note of the true contrary doctrine. The learned judge is not speaking of checks, but of bills of exchange, and is discussing the point whether the bill is an assignment of the funds in the hands of the drawee prior to his acceptance of it. He is clearly of opinion, equally on the abstract principle and the recognized authorities, that the bill does not operate as such an assignment, a doctrine which must now be assumed to be established law. The chain of his legal reasoning is as follows. Where an order is for the whole of a particular fund, it is an equitable assignment thereof, and after notice to the drawee it binds the fund in his hands. But where it is drawn either on a general or a particular fund, for a part only, as was the fact in the case under consideration, it does not amount to an assignment of that part, or give a lien as against the drawee, unless he accepts, *or unless an "obligation to accept may be fairly implied from the custom of trade, or the course of business between the parties, as a part of their contract.*" The reason, he adds, is plain. A creditor cannot split up one cause of action into many. A debtor undertaking to pay an integral sum to one person cannot be obliged to pay in fractions to other persons. It is worthy of note that the "reason" adduced by the learned judge, and which is not anywhere stated or indirectly implied

[3] Saylor *v.* Bushong, 100 Pa. St. 23.

[1] § 527. Planters' Bank *v.* Merritt, 7 Heisk. 177.

[1] § 528. 5 Wheat. 286.

by him to be applicable to checks, is evidently not applicable to them. A depositor *has* an undeniable right to draw any number of checks he may choose against his balance; and it is also undeniable that he may bring his separate suit for damages upon each one separately for the refusal of the bank to pay it on demand. Moreover the obligation of the bank is only to pay the checks *upon presentment* and *demand;* it is therefore liable to no action until it has wrongfully refused to pay; and it is only liable to actions by several different plaintiffs when it has, by several different refusals, been guilty of several different wrongful acts.[2] Plainly, therefore, checks are at least taken out of the *reason* which is the basis of the proposition laid down as governing bills of exchange. But the exception, expressly made by the judge, of paper upon which the obligation of the drawee to pay may arise, as matter of law, from an *implied* contract growing out of the usage of trade or the custom of dealing between the parties, seems to have been inserted for the express purpose of leaving open the door for putting a different construction upon precisely such instruments as ordinary bank checks.

The "implied" contract, if any, must arise from the well known usages of the banking business. An incorporated bank, having received certain peculiar privileges from the community, owes in return to the community certain reciprocal duties. It may be fairly held to undertake with the community to conduct its business according to the well known, established, universal customs of the banking business; and this undertaking with the community at large is an undertaking with each individual in the community; for breach of which, as towards any individual, that individual ought to have a right of action. It is the duty of the bank to pay a good check to the holder when there are funds of the drawer which should properly be appropriated to that purpose. The duty is not denied, and the drawer may have his action for breach of it; and this is by virtue of the contract between himself and the bank. But the breach of duty is also a wrong

[2] See Roberts *v.* Corbin, 26 Iowa, 315 (a poor opinion, but putting this point very clearly).

done to the check-holder; and why should not he have his right of action, not by virtue of an express contract, but by virtue of the general obligation which the chartered bank owes to the public at large and to each member thereof? In this point of view the analogy between the bill of exchange drawn on the merchant and the check drawn on the quasi public corporation evidently fails.

The accurate and careful saving of this exception by Judge Story was quite too significant to escape notice.

§ 529. **England.** — Baron Martin says, "There is no doubt that the bearer of a check is entitled to receive the money; . . . whoever has possession of it as bearer[1] may maintain an action upon it." In this case there were two instruments sued on; one was a bill of exchange, but the other was an ordinary bank check. Judge Sharswood, in his note to page *21 of his edition of Byles on Bills, says, that it might perhaps be inferred that a check duly presented (i. e., of course, for payment) becomes an appropriation of so much of the drawer's funds in the banker's hands, and that if payment be subsequently stopped and all the drawer's funds withdrawn, the bank remains still liable to the holder. He acknowledges, on the strength of Bullard *v.* Randall, *supra*, that this seems to be still unsettled. But he adds, as his own view, that, though the rule does not govern bills of exchange, yet they are not held to be an equitable assignment or appropriation of the sum drawn for, whereas a bank check is so considered; and if the holder be one for value, against whom the drawer cannot rightfully revoke, why then should not the banker, upon distinct claim and notice, be held bound by the equity?

Mr. Grant in his work at first laid down the rule, on the

[1] § 529. Ancona *v.* Marks, 7 Hurl. & N. 686 (1862). All English checks were at that time, by statute, required to be drawn payable to bearer (or to A. or bearer, which was the same thing in law). A check payable to the order of any person named was, by express provision of statute, subject to be stamped as an inland bill of exchange. This law has, however, since been changed, and checks may now in England be drawn payable to order without other stamps than those used on a check payable to bearer.

strength of Ancona *v.* Marks, *supra*, that the holder of a check payable to bearer, or of a check payable to order and indorsed in blank, had a right of action against the bank. But in his edition of 1873 (p. 106) he modifies this doctrine, by saying that the holder cannot sue the bankers in the absence of proof that the check has been accepted by the bankers or charged against the drawer. His sole authority for this statement is National Bank of the Republic *v.* Millard, *supra*, from which he quotes in a foot-note, and adds that the argument to the contrary effect, made in the first edition of this book, is "artificial."

In Keene *v.* Beard, Byles, J. said: "In one thing a check differs from a bill of exchange; it is an appropriation of so much money of the drawers in the hands of the banker on whom it is drawn, for the purpose of discharging a debt or liability of the drawer to a third person; whereas it is not necessary that there should be money of the drawer in the hands of the drawee of a bill of exchange."[2]

§ 530. **Illinois.** — The case of Munn *v.* Burch,[1] was an action by a check-holder against the bank upon which it was drawn. It was held that he could recover, and that, upon *presentation of the check, both the legal and equitable right to the money of the drawer in the hands of the bank passed to him.* In the course of the opinion it was said, that upon receiving the deposit the bank impliedly agrees with the depositor to pay it out, on the presentation of his checks, in such sums as those checks may call for, "and with the whole world he agrees that whoever shall become the owner of such check shall, upon presentation, thereby become the owner, and entitled to receive the amount called for by the check, provided the drawer shall at that time have that amount on deposit." It is said further, "Surely every sound lawyer will at once perceive a privity of contract between the banker and the holder of the check, created by the implied promise held out to the world by the banker, on one side, and the receiving of the check for value and presenting it, on the other." A later case in the same State says that the banker "agrees with the whole

[2] Keene *v.* Beard, 8 C. B. N. S. 372.

[1] § 530. 25 Ill. 21.

world" that the owner of a check which the banker is in duty bound to honor "shall upon its presentation thereby become the owner of, and entitled to receive, the amount specified"; also that, when a good check is presented at the bank, the banker "becomes the holder of the money to the use of the owner of the check, and is bound to account to him for that amount."[2] And other cases affirm the doctrine.[3]

The drawer cannot countermand a check after it has passed to a *bona fide* holder. Upon presentation the holder becomes the legal owner of the deposit to the amount of the check, if the unincumbered funds are sufficient. And it is no defence to the bank that previous to presentment the drawer has ordered it not to pay the check.[4]

A check drawn in Indiana upon a bank in Illinois is to be construed by Illinois law, and will operate as a transfer of the sum named, regardless of the Indiana rule. (See § 12, 7.) The fact that, just before garnishment of the bank in a suit against a depositor, the latter drew a check in favor of the cashier is not of itself evidence of want of good faith, and a bank paying a check *drawn* before the service of garnishment, although not presented till after the service, is protected, for the check is an immediate assignment. Otherwise, as to a check *drawn after the service*.[5]

§ 531. **Iowa** distinguishes a check from other bills of exchange, and gives the holder a right to recover from the drawee after presentment, on substantially the same grounds as in Illinois.[1]

§ 532. **In Kentucky**, it has been held[1] that the payee of a

[2] Bickford *v.* First National Bank of Chicago, 42 Ill. 238; and see Rounds *v.* Smith, id. 245; Brown *v.* Leckie, 43 id. 497.

[3] Chicago Marine & Fire Ins. Co. *v.* Stanford, 28 Ill. 168. So also in Fourth National Bank of Chicago *v.* City National Bank of Grand Rapids, 68 Ill. 398; Merchants' National Bank *v.* Ritzmayer, 20 Brad. App. 29 (1886).

[4] Union National Bank *v.* Oceana Co. Bank, 80 Ill. 212 (1875).

[5] National Bank of America *v.* Indiana Banking Co., 114 Ill. 483 (1885).

[1] § 531. Roberts *v.* Corbin, 26 Iowa, 315.

[1] § 532. Lester & Co. *v.* Given, Jones, & Co., 8 Bush, 357. See also Weinstock *v.* Bellwood, 12 Bush, 139.

check drawn in Kentucky upon a bank in New York could maintain an action against the bank upon the ground that the check operated as an absolute appropriation of so much money in the hands of the drawee. The reasoning of the court seems to place a bank check upon the same basis as an order drawn upon a particular fund in the hands of the drawee.

§ 533. **New York.** — In the case of Harris *v.* Clark,[1] decided in New York in 1849, the court recognized the doctrine laid down in Mandeville *v.* Welch as bound in its application to bills of exchange; but, at the same time availing itself of the exception, said that the rule might not be so reasonably applied to matters of checks, which are practically equivalent to a transfer of actual cash. There are plausible, if not solid, reasons for saying that a check works a transfer *from the time of presentment for payment*, owing to the understanding of all the parties, and to the usual course of business. The same cannot be predicated of bills of exchange, which are not so equivalent to cash, and which are not expected to be paid on the spot, immediately on demand, like checks.

§ 534. **In Ohio,** a check is an absolute transfer,[1] but not of course, unless drawn against funds.[2]

§ 535. **Pennsylvania.** — The common sense of the holder's right to sue the bank is well expressed by Judge Trunkey:[1] "If the check has not been revoked, by common usage the holder expects it will be paid on presentment. He may suffer a real injury by refusal, for which he may be without redress, as in case of the drawer becoming insolvent before recourse to him could be effectual. It would seem that the holder ought to have a remedy against the bank for a wrongful refusal of payment arising from an implied promise from the usages of business, or the course of dealing between the parties. If the bank, in violation of its duty, dishonors a

[1] § 533. 3 Comst. 93.

[1] § 534. Bailey *v.* Burgess, 5 Ohio St. 15; Dodge *v.* Bank, 20 Ohio St. 246.

[2] Chaffee *v.* First National Bank of Ravenna, 40 Ohio St. 10.

[1] § 535. Saylor *v.* Bushong, 100 Pa. St. 23.

check, the holder may be injured quite as much as the drawer, and the bank ought to be answerable to each party injured by breach of the contract."

§ 536. **South Carolina and Louisiana.**—It was said in Fogarties *v.* State Bank,[1] that the holder of a check had a right of action in *assumpsit* against the bank, if it refused to pay the check when it had funds of the drawer available for doing so, *upon the implied promise which the law raises in his behalf.* The idea would have been more satisfactorily expressed if it had been intimated that the law raised this implied promise only from the usage or course of dealing of the parties, or of the community generally. Perhaps the court thought this ground of its ruling to be clear enough without specific exposition; certainly no other basis readily suggests itself, and the logical sequence may be assumed to be obvious. It was further asserted that this was true *especially* where the bank charter stipulated that the bank should "receive money on deposit, and pay away the same to order free of expense." It was hardly worth while for the learned justices to bring forward so insignificant a prop. They had taken a ground that was either tenable without this, or else could not be made tenable at all. The language, directing the bank to do only what every bank that ever existed must do as a part of the most simple and ordinary phase of banking business,—language expressing only what would be regarded as implied in all charters without any distinct expression at all,—could hardly have any such powerful alterative effect upon the ordinary rights of check-holders as to confer upon them the right of suit. A similar view is implied, though not directly laid down, in Vanbibber *v.* Bank of Louisiana.[2]

§ 537. **Wisconsin.**—D. gave P. a check on a bank which held sufficient funds; before presentment suit was brought to dissolve the D. firm and a receiver was appointed. The bank, hearing of this, refused payment, and P. sued the receiver in equity for the amount of the check. The court held that the check was an equitable assignment, as between the drawer and payee the drawer could not arbitrarily stop its payment,

[1] § 536. 12 Rich. Law, 518. [2] 14 La. An. 481.

and that the receiver stood in the drawer's shoes, and could not have any greater right against the payee than the drawer had.[1]

§ 538. **Miscellaneous.** — A check is an absolute appropriation by the depositor of so much in the hands of his banker to the holder, and there it should remain until called for.[1] A bill of exchange for a part of the funds in the hands of the drawee is an assignment without acceptance, and the holder can sue the drawee.[2] Of course, a bill of exchange is not generally an assignment, it is not necessary that it should be drawn against funds, and even if it is, the drawee has not, like a banker, engaged to pay out money in parcels as may suit the drawer.[2] An order of a landlord on a tenant to pay the rent accruing for a time certain to B. was held an equitable assignment, and, after notice to the tenant, he must pay according to the order, whether he had accepted or not.[3] An order for part of a fund is an assignment, and after notice the agent parts with it at his peril.[4]

Authority for holding that a Check is at least an Equitable Assignment between Drawer and Payee.

§ 539. **United States.** — The Mastin Bank made an assignment to Coates, after having issued and delivered a "draft" upon its depositary in New York. Before the "draft" was presented for payment, Coates withdrew the deposit from the New York bank. As between the assignee and payee, Mr. Justice Miller held that the "draft" was in law and fact a check, and that, while a deposit of money in a bank creates a debt on the part of the bank, it is a fund deposited to the credit of the depositor, and that the check operated as an appropriation or equitable assignment, *pro tanto*, of the fund to the holder, and that thus far the fund did not pass to the

[1] § 537. Pease *v.* Landauer, 63 Wisc. 20 (1885).

[1] § 538. 4 Kent, 549; Brown *v.* Lusk, 4 Yerg. 210; Morrison *v.* Bailey, 5 Ohio St. 13; Hoyt *v.* Seely, 18 Conn. 353.

[2] Corser *v.* Craig, 1 Wash. C. C. 424.

[3] Morton *v.* Naylor, 1 Hill, 583.

[4] Peyton *v.* Hallett, 1 Caines, 363.

assignee.[1] In an action to have a check paid in full from the estate of a bankrupt drawer, it was held in the Matter of Brown,[2] in bankruptcy, that the holder was entitled to this, on the ground that a check is an instrument *sui generis*, and is to be construed exactly as the parties intend it; that the check, of itself, is an appropriation of the fund in the hands of the drawee, and that, consequently, the drawer has no right to withdraw the funds after giving the check.

§ 540. Ohio. — In Gardner *v.* National City Bank,[1] a party wishing money procured it by giving his check to a bank in Ohio upon a bank in Philadelphia for the full amount of his deposit in the latter bank. Before the check was presented, the Philadelphia bank remitted to the drawer by a certified check. He deposited this in another bank in Ohio as cash, and it was afterward paid. After making subsequent deposits in this bank, and checking out various sums from time to time, the drawer made an assignment for the benefit of creditors. The assignee and all interested parties were brought before the court by an application on part of the payee of the check to have it paid in full. The court *distinguished the case from one between the payee and drawee, or where the check is for less than the whole fund drawn upon*, and held that, as between the drawer and payee, it was the manifest intention of the parties to transfer the absolute right to receive the amount from the drawee, and that the draft should operate as an equitable assignment of the funds in the hands of the drawee; that it did operate as such assignment, and that, when the drawer received the amount from the drawee, it in equity belonged to the payee.

§ 541. In the German Savings Institute *v.* Adae, the court said that, as the question was not between the drawee and the holder, but only between the holder and the assignee of the drawer in insolvency, their opinion was that the check-holder had the better equity.[1] In the United States Circuit

[1] § 539. First National Bank of Cincinnati *v.* Coates, per Miller, J., 3 McCrary, 9.

[2] 2 Story C. C. 502 (1843). [1] § 540. 39 Ohio St. 600.

[1] § 541. German Savings Institute *v.* Adae, 8 Fed. Rep. 106.

Court, Judge Miller decided in the same way in First National Bank *v.* Coates.[2] An order against a city upon funds due the drawer makes the city liable to the holder to the amount unpaid and owing to the drawer.[3] "In equity an order given by a debtor to his creditor, upon a third person having funds of the debtor, to pay the creditor out of such funds, is a binding equitable assignment of so much of the fund."[4] So a check on a particular fund is an assignment in equity, and anything which indicates the intent to make an absolute transfer is sufficient.[5]

§ 542. **Effect of a Check as depending on the Law of Place.** — If in the State where a check is drawn it is regarded as an assignment, legal or equitable, as between the holder and the drawer or his assignee for creditors coming afterward into possession of the deposit, such will be its effect, no matter where the check is payable; as where a check was drawn in Ohio the day before the drawer assigned for the benefit of creditors, the law of Ohio was applied, and the holder of the check preferred in a suit against the assignee, who had received the deposit, without regard to the law of the State where the instrument was payable.[1] But the effect of a check on the deposit so long as it is in the hands of the bank is governed by the law of the locus of the bank, i. e. the place of performance of the contract.[2] A check drawn in Indiana on an Illinois bank is an immediate transfer, while a check drawn in Illinois on an Indiana bank is not a transfer until acceptance, except as against the drawer and his creditors, in cases like the above, where the deposit was paid over to the

[2] 8 Fed. Rep. 540.

[3] Hall *v.* City of Buffalo, 1 Keyes, 193; Ballou *v.* Boland, 14 Hun, 355.

[4] Burn *v.* Carvalho, 4 My. & C. 690; Rodick *v.* Gandell, 1 De Gex, M. & G. 763.

[5] McWilliams *v.* Webb, 32 Iowa, 577; Moore *v.* Lowrey, 25 Iowa, 336; First National Bank *v.* D. & S. Co., 52 Iowa, 378; County of Des Moines *v.* Hinkley, 62 Iowa, 637.

[1] § 542. Davis *v.* Adae, 4 Bull, 295 (Cincin.).

[2] Andrews *v.* Bond, 13 Peters, 65; National Bank of America *v.* Indiana Banking Co., 114 Ill. 483; Dreyfuss *v.* Adae, 4 Bull, 671 (Ham. Co. Dist. Court).

assignee, and had to be distributed according to the equities of the law of the drawer's locus.

§ 543. **Effect of Check as Payment.**[1] — The presumption is that a check is only intended as conditional payment, and if dishonored, and the holder is not guilty of laches, causing loss to the drawer, the latter is liable upon the original cause, or debt for which the check was given.[2] By agreement a check may be taken as absolute payment, and the drawer will then be liable only as an indorser, and not on the original debt.[3] And a check is always so far payment until dishonored, that, after its delivery, the drawer cannot be garnisheed as debtor of the payee in respect to the debt for which the check is given.[4] Any laches of the holder discharges the drawer on the original debt so far as he is injured by it, and loss of the check by holder, whether negligent or not, has the same effect.[5] It may be shown by parol that a check is a loan, and not a payment of a debt.[6]

§ 544. **Check is presumed to be only Conditional Payment.** — W., a debtor, caused the C. bank, as his agent, to transmit to N., his creditor, a draft of the C. on a New York bank. The draft was without delay forwarded for collection, whereupon N. forwarded to W. the account marked, "Paid April 8, 1881," and signed by N. The draft was protested, and the C. bank failed. Held, that W.'s original debt to N. was not extinguished.[1] The Georgia Code, § 2867, to the effect that a bank check is not payment till it is itself paid, merely expresses the previous common law.[2] One who receives a check acts as agent of the debtor in making the collection,[3] and if not negligent he may recover on the original debt, in case the check is not paid.[4] A check is

Though creditor send the account marked paid.

[1] § 543. See payment by certificate of deposit, §§ 304, 305; by bank bills, § 637.

[2] § 544. [3] § 546. [4] § 545.

[5] § 546. [6] § 547.

[1] § 544. Weaver *v.* Mixon, 69 Ga. 699 (1882).

[2] Phillips *v.* Bullard, 58 Ga. 256 (1877).

[3] Kobbi *v.* Underhill, 3 Sand. Ch. 277.

[4] Cromwell *v.* Lovett, 1 Hall, 56.

not payment until paid,[5] even though the drawer has funds,[6] and though the check is given for a note that is surrendered,[7] or in payment of a former check,[8] except in cases where it is positively agreed to be received in absolute payment.[9] When goods are bought and paid for by check of the buyer, or of a third party, and the check or other security given for the price turns out to be of no value, it may be treated as a nullity, and an action will lie for the price.[10]

§ 545. A check given by a debtor in settlement of an account is so far payment as to discharge the drawer as trustee of the payee, service being made on him after giving the check but before presentment; the check is payment *unless dishonored*.[1]

§ 546. **Check may be an Absolute Discharge, by Agreement, by Laches of Holder, or by Accident.** — The just principle seems to be, that if the check is paid, or if its nonpayment is not due to any fault of the drawer, nor to insolvency of the bank within the standard time for presentment, the drawer is discharged so far as it would prejudice him to make the holder good. A check is a negotiable instrument, and, if given and accepted in satisfaction of a debt for a larger amount, discharges the debt.[1] *Prima facie* a bill or note is only conditional payment, but by agreement it may be an absolute discharge (if genuine and there is no fraud) of the original debt, and the debtor be thereafter only responsible as indorser; as where the debtor proposed to remit a draft "in payment

[5] Marrett *v.* Brackett, 60 Me. 527; Burkhalter *v.* Second National Bank, 42 N. Y. 538; Taylor *v.* Wilson, 11 Met. 44; Kermeyer *v.* Newby, 14 Kans. 164; Mordis *v.* Kennedy, 23 Kans. 408.

[6] Everett *v.* Collins, 2 Camp. 515; Porter *v.* Talcott, 1 Cow. 359.

[7] Olcott *v.* Rathbone, 5 Wend. 490.

[8] Kelty *v.* Second National Bank, 52 Barb. 328.

[9] Freeholders of Middlesex *v.* Thomas, 20 N. J. Eq. 41; Blair *v.* Wilson, 28 Gratt. 165; Mullins *v.* Brown, 32 Kans. 312; Turner *v.* Bank, 3 Keyes, 425, aff. 23 How. Pr. 399.

[10] Fleig *v.* Sleet, 43 Ohio St. 53; Manufacturers & Mechanics' Bank *v.* Gore, 15 Mass. 75.

[1] § 545. Getchell *v.* Chase, 124 Mass. 366.

[1] § 546. Wells *v.* Morrison, 91 Ind. 51 (1883).

of bill in full," and the offer was accepted, and the receipt of the draft acknowledged in payment of the account in full, the creditor could not bring suit afterward on the account, but only on the indorsement; though in case of forgery, fraud, or misrepresentation, the rule would be different.[2]

By agreement of the parties, a check may be given and received in absolute discharge of a debt; and whether it was so given is a question of fact for the jury.[3] But in absence of agreement, a check given for an antecedent debt is not an extinguishment of it, but is only a means of payment,[4] except when the drawer is injured by the laches of the holder, and then the drawer is discharged so far as injured.[5] It would seem also, that even though the payee is not negligent, yet if by accident or fraud the check passes from him and is paid to a *bona fide* holder for value without notice, the payee should bear the loss. If paid on a forged indorsement, of course he can recover of the bank unless negligent. (See § 395 A.)

§ 547. **Check as a Loan.** — The presumption is that a check is given as payment,[1] but it may be shown to be a loan; as where A. (deceased) had given B. a check, and it was proved that A. was free from debt, and that B. had not rendered him service, the check was deemed a loan.[2]

§ 548. **Gift of Check.**[1] — A gift *inter vivos* requires intent to pass the property without reference to death,[2] and actual or constructive delivery.[3] A gift *donatio causa mortis* requires (1) intent to pass the property upon the death of the donor from

[2] Day *v.* Thompson, 65 Ala. 269 (1880).

[3] Blair *v.* Wilson, 28 Grattan, 165 (Va., 1877); Springfield *v.* Green, 7 Baxter, 301.

[4] Peoria & Pekin Union R. Co. *v.* Buckley, 114 Ill. 337; Stevens *v.* Park, 73 Ill. 387; Heartt *v.* Rhodes, 66 Ill. 351; Small *v.* Franklin Mining Co., 99 Mass. 277; Ocean Towboat Co. *v.* Ship Ophelia, 11 La. An. 28; Davison *v.* City Bank, 57 N. Y. 82; Sweet *v.* Titus, 11 N. Y. S. C. 639; Phillips *v.* Bullard, 58 Ga. 256; Currie *v.* Misa, L. R. 10 Exch. 153.

[5] Blair *v.* Wilson, 28 Grattan, 165 (Va.); Taylor *v.* Williams 11 Met. 44; Sweet *v.* Titus, 11 N. Y. S. C. 639; Stevens *v.* Park, 73 Ill. 387.

[1] § 547. Koehler *v.* Adler, 91 N. Y. 657.

[2] Stimson *v.* Vroman, 99 N. Y. 74.

[1] § 548. See gift of deposit, 607. [2] § 549. [3] § 551.

his existing illness, and (2) delivery. Some cases say, actual payment of the check in the life of the donor is necessary, or payment afterward, the bank being ignorant of the drawer's death. Others hold that death does not prevent collection of the check, and this seems the better opinion in reason.[4] Justice requires that a check given as a *donatio mortis causa* should be payable within a reasonable time after death, and if the donor's personal representatives have got possession of the deposit, the check should be good against the estate; but, as the law stands, the donee must, to be safe, collect in the life of the donor, or transfer for value to a *bona fide* holder.[5]

§ 549. **Gift of a Check, Causa Mortis and Inter Vivos.** — A gift may be *inter vivos*, i. e. intended to take effect without reference to the death of the donor, in which case there must be (1) an intent to pass the property, and (2) actual delivery; or the gift may be a *donatio causa mortis*, i. e. intended to take effect only upon the donor's death from his existing illness,[1] in which event it is said in some cases that there must not only be an intent to pass the property, but an actual delivery of the money in payment of the check, or at least on acceptance of the check before death of the donor, if the check be drawn by him.[2] That there must be an actual delivery at some time, in order to complete the gift, is of course true; and that there must be such a delivery by the donor as to clearly indicate his intent to transfer the property from himself, and an actual transfer of the rightful possession or control of the property, is also true. But this, we contend, is done when he gives a check to the donee, or to another to give to the donee, and does not revoke before the delivery is made according to instructions. In this peculiar case of a check, the donor could revoke during his life; but as against the rest of the world it is a clear delivery of control of the money, and no one but the creditors of the donor have a right to object. They have a

[4] § 550.

[5] § 549.

[1] § 549. Kenistons *v.* Sceva, 54 N. H. 37 (Foster, J.).

[2] See cases cited in the next section. Death before payment revokes except as against *bona fide* holder. Boutts *v.* Ellis, 17 Beav. 121.

superior equity to the donee,[3] but if the donor is solvent, and continues in the same mind till his demise, what right has any one else to interfere with his clear intent? A bill of exchange may be the subject of a *donatio causa mortis*,[4] and the death of the drawer of a bill does not operate to change the duty of the drawee to accept it;[5] why should it be different in the case of a check? The rule that has grown up is a child of the error that the drawer's death is a revocation (§ 396) of the bank's authority to pay his checks, and should be banished with its parent. It does not seem sensible to say that a *donatio causa mortis* is a gift to take effect *in case of death*, and then to say that the donor did not intend it to be good unless it took effect before his death. And if he intended it to take effect after death, why not give life to his intent? If it is said that the formalities of the wills act must be conformed to in order to guard against fraud, then let the law be consistent, and deny the possibility of any gift *causa mortis*, by savings bank book, or any delivery actual or constructive. If he had given bank bills, or the same money that is on deposit in the bank, to some person, D., to keep, and in case the donor died to give it over to the donee, it would surely be held a good gift; in such case, it could not be properly said that the agent's authority was revoked by his principal's death, for it is clear that, instead of ceasing at the donor's demise, it is then only that the agent's authority arises. Where a donor delivered to B. for the donee, it has been held that a delivery by B. to the donee after the death of the donor is good.[6] And if an agent's authority does not always die with his principal, then is it not common sense to hold that a bank's authority does not cease, at any rate in relation to checks that the donor delivered with the very intent that the fund should go to the donee in case of his death? The donor has a right to do with his property as he chooses, and his intent clearly indicated should be respected, and his personal representative

[3] Chase *v.* Redding, 13 Gray, 418.
[4] See Rolls *v.* Pearce, § 550 *a*.
[5] 1 Parsons on N. & B. 287; Cutts *v.* Perkins, 12 Mass. 206.
[6] Sessions *v.* Moseley, 4 Cush. 87.

has no right to frustrate his wish. The continuous progress of legal thought on this subject of gift points to the conclusion set forth above; viz. that although a gift of a check cannot give an action against the donor himself, nor prefer the donee to creditors, yet it should be held otherwise good. And if the donor is solvent and does not revoke during his life, it ought, we think, to be good against the *deposit*, and against his personal representatives when they have obtained possession of the deposit, on which the check was drawn; for in this respect the theory that said personal representatives are identical with the deceased is groundless; any action they may take against the donee profits, not the deceased, but his heirs and legatees, and therefore the executor or administrator in reality represents said heirs or legatees, and as against them the donee has the superior equity.

In early times only chattels which could be delivered by hand were allowed to be subjects of *donatio causa mortis*; then bank bills, and securities payable to bearer or to order and indorsed; then bonds; and subsequently non-negotiable paper has been held to pass, and negotiable paper indorsed by the donor, although of course the estate of the donor ought not to be liable on the indorsement, the fair presumption being that the donor intends to give the security held by him against some third party. And it seems only a proper continuance of this spirit, manifested more and more by the law, to give effect to *bona fide* transactions, and thus so far as possible secure stability and favor prevision, to hold that, when the donor gives his check and dies solvent without revoking the gift, it should be held valid against all the world beside; to hold otherwise is to allow others to declare the donor's act a nullity which he by his conduct clearly declared to be valid, and the wills act should be confined to cases in which there is no constructive or actual delivery of possession or the emblem of control.

§ 550. **The Cases** are in great confusion. Grant lays it down that a check may be the subject of a good *donatio mortis causa*.[1] But in Williams on Executors the contrary doctrine

[1] § 550. Grant on Bankers and Banking (3d ed.), p. 107, citing Boutts

is asserted; the author remarking that a check "is an order for the payment of money, that may take effect immediately, and in the lifetime of the donor; so that it is (generally speaking) altogether inconsistent with the nature of a donation *mortis causa*."[2]

(*a*) A testator, upon his death-bed, drew a check to the order of his wife, and gave it to her. Before his death she indorsed it and deposited it with bankers in a foreign country, and subsequently she drew sundry checks upon these bankers against this deposit, which checks appear to have been duly honored. The bankers on whom the check was drawn refused payment when the check was presented after the decease of the drawer, on the ground that after the death their authority to pay was at an end. The question was then presented whether or not the check was a good *donatio mortis causa*. Vice-Chancellor Malins remarked that the law seemed to be in a curious state, since it permitted a bill of exchange, in its nature not payable till a future day, to be a good subject of *donatio*, but denied this privilege to a check unless it should be presented for payment before the drawer's death. He then sought to confine the rule as regards checks to such only as are payable to bearer, admitting that these must fall within the foregoing doctrine. The check in question was payable to order, and it was clear that the testator knew that it could not be presented for payment either on the day when it was drawn or on the next following day. "I must attribute to him the knowledge that the check would not be paid for some time, and on that ground I come

Rolls *v.* Pearce.

v. Ellis, 4 De G. M. & G. 249; 17 Jur. 405 (585); Tate *v.* Hilbert, 4 Bro. C. C. 286; 2 Ves. Jr. 111; Reddell *v.* Dobsee, 3 Jur. 722; 10 Sim. 244; Hewitt *v.* Kaye, 37 L. J. Ch. 633.

[2] Williams on the Law of Executors and Administrators, p. 779, citing Tate *v.* Hilbert, 2 Ves. Jr. 111, at p. 120; s. c. 4 Bro. C. C. 286; Tate *v.* Leithead, Kay, 650; Hewitt *v.* Kaye, 6 L. R. Eq. 198; In re Beaks Estate, 13 id. 734 (where the pass-book was also given to the payee, but the check was not presented till after the drawer's death); Second National Bank *v.* Williams, 13 Mich. 282; Harris *v.* Clark, 3 N. Y. 93; Contant *v.* Schuyler, 1 Paige, 316; Shirley *v.* Whitehead, 1 Ired. Eq. 130; Mandeville *v.* Welch, 5 Wheat. 277 (286); Tiernan *v.* Jackson, 5 Pet. 580.

to the conclusion that this case differs from the other cases of checks. . . . I think that when a man gives his wife a check, it is in substance as complete a gift as if he handed her the cash." The Vice-Chancellor regarded Tate *v.* Hilbert as an authority directly supporting him, and preferred, "if there is any real discrepancy," to accept as correct the report of that case given in 2 Ves. 111, rather than the report contained in 2 Bro. C. C. 291. This case he interpreted as intending to hold "that an actual dealing for value with a note would complete the gift as a valid *donatio mortis causa*."[3]

Where the testator in his last illness drew a bill on his goldsmith in favor of A., and delivered it to her with directions indorsed upon it to buy her mourning, it was held a good *donatio mortis causa*.[4]

(*b*) So where a testator, remarking to his wife that he was dying, and that she would want money before his affairs could be settled, gave her a crossed check, and afterward procured a friend to take this and give to the wife his own [the friend's] check in exchange therefor, and the testator's check was paid before his death, and the friend's check after the death, it was held that the testator's check was good as a *donatio mortis causa;* but, at the same time, it was declared that a check not presented before the drawer's death was not a good *donatio mortis causa*.[5]

Where the check was presented before the donor's death, and was not then paid only because the bankers were in doubt as to the genuineness of the signature, and on the day following the drawer died, the payee was held to be entitled, on the ground that there had been a complete gift of the amount of the check *inter vivos*.[6]

(*c*) A somewhat different case is where the donor gave to the donee an instrument whereby the banker acknowledged that he held a certain sum belonging to the donor at the

[3] Rolls *v.* Pearce, 5 Ch. D. 730.

[4] Lawson *v.* Lawson, 1 P. Wms. 441.

[5] Boutts *v.* Ellis, 17 Beav. 121; s. c. affirmed on appeal, 4 De G. M. & G. 249.

[6] Bromley *v.* Brunton, 6 L. R. Eq. 275.

donor's disposal. This gift was upheld as a good *donatio mortis causa*.[7] Here, however, we have the peculiar state of facts of the banker's acknowledgment, followed by the actual disposition of the fund. It resembles an assignment, such that at once upon its completion the banker held the money for the assignee or donee, and no longer for the donor, — quite a different condition of affairs from that resulting from the delivering of a check. In Missouri it is said that delivery is essential, even if it is possible that a check can be a good *donatio causa mortis*.[8]

(*d*) The check of A. to the order of B. was delivered by B. indorsed in blank to C. as a gift, the day before B.'s death. It was held good though not presented till after B.'s death; but if it had been drawn by B., his death would have been a revocation.[9]

(*e*) The law wishes to protect dying persons from fraud, and from this care results the provisions in regard to wills, that such matters may be properly evidenced. It was said in Vermont: "The very circumstance which sometimes renders a will suspicious is the living principle in a *donatio causa mortis*.[10]

§ 551. **Gift Inter Vivos.** — The remarks above as to *donatio causa mortis* apply partly to checks given *inter vivos*. The transfer of the paper to the possession of the donee should be regarded as sufficient evidence of intent to give the amount to the donee, very much as the transfer of the pass-book with intent to transfer the deposit is held sufficient (§ 607). There is, to be sure, ground for holding that the donor may revoke in his lifetime by countermanding the check (§ 396), except as against a *bona fide* holder. For in the case of an ordinary check the bank must pay according to that order of the depositor that first reaches it. But if the donor does not revoke, and he is solvent, we think the gift should be good as a transfer of the

[7] Amis *v.* Witt, 33 Beav. 619; Grymes *v.* Howe, 49 N. Y. 17; Meach *v.* Meach, 24 Vt. 591; Harris *v.* Clark, 3 N. Y. 111.

[8] Walter *v.* Ford, 74 Mo. 195.

[9] Burke *v.* Bishop, 27 La. An. 465.

[10] Holley *v.* Adams, 16 Vt. 206.

deposit *pro tanto* against all the world beside, whether the donor be dead or alive. The cases, however, do not allow any right in the donee as against the personal representative who has got possession of the deposit on which the check was drawn; and the drawer's death is held to revoke the bank's power to pay his checks. So that, as the law stands, a gift check must be turned into money before the drawer's death, or the holder must transfer it to a *bona fide* purchaser, in order to realize on it.

A check was delivered with intent to make a gift of the fund, but the drawer died before the check was paid or accepted, and the court held that this fact revoked it (§ 396), saying there must be a complete delivery of the subject matter to constitute a valid gift.[1] If a check be given by the drawer to the payee as a gift, and be then dishonored by the bank, the payee has no right of action thereon against the drawer, since the instrument constitutes a mere gratuitous undertaking, and the transaction remains incomplete until the money has actually passed. The check, before payment, is in the nature only of a promise to pay.[2] A father gave his little boy a check, saying, "I give this to baby for himself," after which he took the check from the boy's hand and put it away. Although the father expressed further his intent to give the amount to his son, the court held that no trust had been declared, and when the father died the amount did not go to the son.[3] If the law is to look at substance, and not form, we think that giving the boy this check was the same as to intent as giving him so much money, and no one but the father or his creditors had any right to object. A gift of negotiable paper of a third party does not give any right of action against the donor or his personal representatives to the donee,[4] but against parties prior to the donor the donee can recover the same as the donor could;[5] and a *bona*

[1] § 551. Simmons *v.* Cincinnati Savings Society, 31 Ohio St. 457.
[2] Easton *v.* Pratchett, 1 C. M. & R. 808.
[3] Jones *v.* Lock, L. R. 1 Ch. App. 25.
[4] Easton *v.* Pratchett, 1 C. M. & R. 798.
[5] Milnes *v.* Dawson, 5 Exch. 948.

fide holder for full value can recover against all parties, though, if a *bona fide* holder gives an inadequate consideration, he can recover only what he paid, as against a party having a defence against the donor.[6]

§ 552. **Checks as Evidence of Debt and Payment. — As between Drawer and Payee.** — A check which has been in circulation, or which has been paid and cancelled by the bank on which it is drawn, may become very valuable as evidence of the fact of payment of the debt of the drawer to the payee. It is not, of course, proof positive of this fact, and as preliminary to its introduction a debt owing from the drawer to the payee at or before the date of the check must be shown. But this basis having been established, the production of the circulated or paid and cancelled check is *prima facie* evidence of payment.[1] But a mere check, without more, is not conclusive evidence of a debt due from the drawer to the payee. It must be supplemented by proof of the consideration on which the check was given.[2]

The *prima facie* evidence afforded by a check is open to rebuttal, by proof of circumstances going to show that the intention of the parties at the time of the passing of the check was not to pay and cancel the indebtedness between them, but to make an independent transaction in the way of a loan. A. may be indebted to B., and yet it may be arranged and understood between them that the transfer of money on any particular occasion from A. to B. shall not operate as a payment and discharge of the debt, either in whole or in part, but shall constitute a distinct and separate dealing in the shape of a loan from A. to B. In such a case the evidence of the check may be overruled by the explanatory evidence, showing the real character of the transaction.[3]

Check may be given as a loan.

[6] Brown *v.* Mott, 7 Johns. 361; Youngs *v.* Lee, 18 Barb. 187.

[1] § 552. Bleasby *v.* Crossley, 3 Bing. 430; Pearce *v.* Davis, 1 M. & Rob. 365; Patton's Adm'r *v.* Ash, 7 Serg. & R. 116; Mountford *v.* Harper, 16 M. & W. 825; 16 L. J. Exch. 182; Thompson *v.* Pitman, 1 F. & F. 339.

[2] Aubert *v.* Walsh, 4 Taunt. 293; Lloyd *v.* Sandilands, Gow, 15; corrected by Alderson, B., in Mountford *v.* Harper, 16 M. & W. 825; Patton *v.* Ash, 7 Serg. & R. 116.

[3] Boswell *v.* Smith, 6 Car. & P. 60.

If a check be made payable to A. *or bearer*, it is not evidence of payment of the drawer's debt to A., unless there is also evidence that the amount has been actually paid to A. A.'s name indorsed upon the back of the check will be sufficient evidence that he has received the money upon it.[4]

§ 553. **As Between Drawer and Bank.** — A check shown to have been presented and paid is not evidence of a loan or advance by the bank to the drawer. On the contrary, the presumption of law always is that a check is drawn against, and paid out of, funds previously deposited. Accordingly a paid check is *prima facie* evidence of a *repayment pro tanto* by the bank of a prior deposit. If it is claimed to be an overdraft, and that its payment was an advance to the customer, the burden of proving it to be so is upon the bank.[1] Possession by the drawee bank is *prima facie* evidence of payment.[2]

§ 554. **Check as Testamentary Instrument.** — A check may, under proper circumstances, be admitted to probate as a testamentary document.[1]

[4] Egg *v.* Barnett, 3 Esp. 196.

[1] § 553. Fletcher *v.* Manning, 12 M. & W. 571, cited and approved in Lancaster Bank *v.* Woodward, 18 Penn. St. 357; Other *v.* Iveson, 3 Drew. 177; 24 L. J. Ch. 654; Byles on Bills, p. *23. Also Sharswood's note to p. *21 of same.

[2] Wilson *v.* Goodin, Wright, Ohio, 219.

[1] § 554. Walsh *v.* Gladstone, 1 Phil. Ch. C. 294; Bartholomew *v.* Henley, 3 Phil. 317; Heming *v.* Clutterbuck, 1 Bligh, N. S. 479; Brine *v.* Ferrier, 7 Sim. 549; Gladstone *v.* Tempest, 2 Curt. 650; Jones *v.* Nicholay, 2 Robt. 288; In the Goods of Marsden, 1 Sw. & Tr. 542.

CHAPTER XXXV.

NOTES AND ACCEPTANCES.

§ 556. Analysis. See Payment of Checks, § 362. Forged Checks, § 461. Payment of Deposit, § 310.

The law of this subject is in a very confused state.

Duty to Pay.

It is *held*,

§ 557. (1) That when a note is made payable to a bank, or a bill is accepted payable there, it is equivalent to an order by check, and the bank must pay under the same limitations, 310, 430, and

§ 558. that it *may* even advance the money. This is no doubt the coming rule; it is in the track of increasing definiteness in commercial relations.

§ 557 *a*. (2) That at any rate a bank *may* pay.

§ 557 *b*. (3) That it is under no obligation to pay.

§ 557 *c*. (4) That it has no right to pay without express orders.

Note held by Bank. Bank *v.* Maker of Note.

(5) When the note is held by the bank, it *may* appropriate to it any

§ 559. deposit at maturity or subsequently received, (unless specifically for other object,) or proceeds of paper owned by the maker of the note in its hands for collection.

§ 559. (6) But is under no obligation to do so. It may sue the maker on

§ 560. the note instead, but he can set off his deposit if still in bank.

Retention.

§ 561. (7) A bank cannot retain a deposit for a note not due, but equity will permit such retention, if the bank is in danger of loss.

Rights of Indorsers.

It is *held*,

§ 562. (8) That if the bank, having a note, fails to apply an existing and applicable deposit upon the note, the sureties are discharged.

§ 562 *b*. Of course, if there is anything in the agreement between the parties to the paper, or between the bank and the depositor, inconsistent with the application of the funds to the paper, the bank is in no fault, and the sureties are not discharged.

This rule approved.

§ 562 *a*. (9) That as to deposits subsequent to maturity no such duty exists.

(10) That a bank is not bound to apply a deposit to a note as against sureties.

§§ 563, 557 *b*. (11) That a bank has no right to pay a note without orders.

A Specific Deposit,

§ 564. Made for the express purpose of paying a bill or note, cannot be applied to any other purpose.

§ 564. Whether the holder can sue the bank for improper refusal to pay in such case, quære. § 490 A.

§ 564 A. Certification of Notes.

§ 557. **Note made Payable at the Bank.** — If the note of a depositor is made payable at a bank, it is its duty to pay the same. It "is equivalent to a check drawn by him on that bank" except as to discharge of maker by non-presentment.[1]

It is the bank's duty to pay depositor's notes.

(*a*) As it is the duty of the bank to pay its customers' checks, when in funds, so at least it has authority, if it is not actually under obligation, to pay his bills, notes, and acceptances, drawn on or made payable or negotiable at the bank.[2] For it is a presumption of law that if a customer does so draw upon his bank, or make any of his paper payable or negotiable there, it is his intent to have the same discharged from his deposit. It is his order to pay, equally with his check; and if the bank pay, without express orders to the contrary, it shall be protected in so doing, and it shall be a good defence to a suit by the depositor. Nay, it has been said that, if the bank refuse to pay, it shall be liable in damages, in like manner as for its refusal to pay the check of a customer when in funds sufficient to do so. But in case of its refusal to pay an acceptance, the writ shall lie in favor of the acceptor only, and not in favor of the drawer; for it is to be supposed that the acceptor provided the funds; and, further, it would seem that at any rate the payment could be properly made only from his funds, since it was at least *prima facie* his duty, and not the drawer's, to supply the means of payment.[3]

At least it has authority so to do.

[1] § 557. Indig *v.* National City Bank, 80 N. Y. 106.

[2] Kymer *v.* Laurie, 18 L. J. Q. B. 218; and see Woods *v.* Thiedeman, 1 H. & C. 478; Mandeville *v.* Union Bank, 9 Cranch, 9 (Marshall, C. J.); Ætna National Bank *v.* Fourth National Bank, 46 N. Y. 82; Citizens' Bank *v.* Carson, 32 Mo. 191.

[3] Thatcher *v.* Bank of State of New York, 5 Sandf. 121; Griffin *v.* Rice, 1 Hilt. 184; Mandeville *v.* Union Bank, 9 Cranch, 9. In this last

(*b*) A bank is under no obligation to pay a note made payable at its counter, unless the maker has placed funds there for that purpose;[4] and retention of a note sent through the clearing-house after the hour named in the rules for return of checks is not payment, even though the bank have funds of the maker, in the absence of evidence that the depositor had authorized the bank to pay his notes out of his deposit.[4]

(*c*) A bank at which a draft or note is payable has no right without the acceptor's or maker's special direction, verbal or written, to apply thereto money which he has on deposit in the bank.[5]

§ 558. **Bank may advance the Money called for by the Bill or Note.** — If the banker at whose counter the bill or note of his customer is made payable has not at the time for payment a sufficient amount for this purpose to the credit of the customer, but if, nevertheless, he pays the bill or note, making up the deficit from his own funds, he will be entitled afterward to recover the amount so advanced by him, as money loaned to, or paid for the use of, the customer.[1] Though, of course, if the signature of the payee, or of the customer, be forged, the banker has lost his money.[2] If, however, the transaction on the part of the banker is not strictly a payment by him of his customer's paper, but is a dealing by way of discount, whereby he discounts such paper for a third party, it seems that the banker may recover from such third party.[3]

case it was held that a bank was authorized to *advance* on the drawer's account the money called for by his bill or draft.

[4] Exchange Bank *v.* Bank of North America, 132 Mass. 150.

[5] Haines *v.* McFerren, 19 Brad. 172 (1885, Ill.); Wood *v.* Merchants' Savings, Loan, & Trust Co., 41 Ill. 267 (leader). See also Ridgely National Bank *v.* Patton, 109 Ill. 479 (1884); Second National Bank *v.* Hill, 76 Ind. 223; Scott *v.* Shirk, 60 Ind. 160; Gordon *v.* Muchler, 34 La. An. 604.

[1] § 558. Foster *v.* Clements, 2 Camp. 17; Mandeville *v.* Union Bank, 9 Cranch, 9.

[2] Ibid.; Cocks *v.* Masterman, 9 Barn. & Cr. 902.

[3] Fuller *v.* Smith, 1 C. & P. 197.

§ 559. **Bank v. Maker, when Note is held by the Bank.** — A bank, holding a note of a depositor, is under no obligation as against the maker to appropriate a sum sufficient to meet it from his funds on deposit, immediately upon its maturity, or indeed at any other particular time; they may let the account run on, and take the chance that they will not lose in the end.[1] They are, however, at liberty at any time after maturity to make such appropriation, especially if the depositor seeks to withdraw his funds, or so much of them as not to leave a balance equal to the amount of the note. And not only the deposit in bank at maturity, but all afterward received (not for other purpose specifically) and proceeds of commercial paper owned by the depositor and left with the bank for collection, may be so applied.[2] Whether or not they could charge interest for the period during which their own neglect has allowed their debt to remain uncollected is a question which has never been passed upon. Probably they could do so. For ability to collect by a stoppage of the debtor's funds is by no means equivalent to payment or discharge, and is not an act which they are under any obligation to him to do. Where the note had been put in judgment, without any previous effort by the bank to pay it from the depositor's balances, it was held that the judgment might still be set off by the bank against the deposit account. The bank could not be compelled to lose anything because it chose to waive a lien, and proceed like any ordinary creditor. It therefore appears that, however objectionable it may be as a hardship upon the debtor, yet it is a strict legal right of a bank holding a depositor's note and sufficient of his funds to meet it at or after maturity, to refrain from applying these funds to this purpose, and to put the note in suit.

[1] § 559. Marsh *v.* Oneida Bank, 34 Barb. 298. But see McCagg *v.* Woodman, 28 Ill. 84.

[2] A bank may apply deposit in payment of note. Muench *v.* Valley National Bank, 11 Mo. App. 144 (1881). See Ehlermann *v.* St. Louis National Bank, 14 Mo. App. 591, Append.; and Home National Bank *v.* Newton, 8 Ill. App. 563 (1881).

§ 560. **Bank's Insolvency. — Maker's Set-off.** — As the bank has thus the right to pay itself the promissory note of the depositor out of his deposit, so, on the other hand, the depositor has the reciprocal right of demanding that the bank shall do so. Where a banker, holding a customer's note, before maturity thereof made an assignment of all his property for the benefit of his creditors, including, of course, both the note and the customer's balance, it was held that the customer might insist upon having the note satisfied out of the deposit standing to his credit.[1]

§ 561. **Retention of Deposit to pay Note not yet due.** — A bank has no legal right to retain a deposit to pay notes not yet due.[1] But equity will allow such retention, if the bank is in danger of loss. (See § 323.)

§ 562. **Rights of Indorsers.** — If a note payable at a bank is sent there for collection, and the bank fails to apply an unappropriated deposit of the maker to its payment, the indorser is discharged. When a creditor has within his control the means of paying the debt out of property of the debtor properly applicable to the purpose, and does not use the opportunity, but gives up the property, the surety is discharged.[1]

Failure of bank to apply deposit to note discharges surety.

(*a*) But if the funds are insufficient at maturity, and the note is protested, the bank is not obliged to apply subsequent deposits to the note in order to save the indorser.[2] And

[1] § 560. McCagg *v.* Woodman, 28 Ill. 84. See Marsh *v.* Oneida Bank, 34 Barb. 298.

[1] § 561. Jordan *v.* National Shoe & Leather Bank, 74 N. Y. 473; Commercial National Bank *v.* Proctor, 98 Ill. 558; Appeal of Farmers & Mechanics' Bank, 48 Pa. St. 57; State Savings Association *v.* Boatmen's Savings Bank, 11 Mo. App. 292.

[1] § 562. McDowell *v.* Bank of Wilmington & Brandywine, 1 Harr. 369; Dawson *v.* Real Estate Bank, 5 Pike, 283; Commercial National Bank *v.* Henninger, 105 Pa. St. 496 (1884); Everly *v.* Rice, 8 Harris, 297; Kuhns *v.* The Westmoreland Bank, 2 Watts, 136.

[2] People's Bank of Wilkes-Barre *v.* Legrand, 103 Pa. St. 309 (1883); Martin *v.* Mechanics' Bank, 6 Harr. & Johns. 235 (1824); First National Bank *v.* Zahm, 16 W. N. Cas. 552; Voss *v.* German American Bank, 83 Ill. 599 (1876); National Bank *v.* Smith, 66 N. Y. 271.

where the note first presented was refused for lack of funds, and afterward, deposits coming in, a second note was paid, it was held that, as there was no evidence of any intention to apply the money to the first note, and the liability of the indorser and maker had become absolute before the deposit, the bank was right in regarding it as a general deposit to be paid upon the first order presented.[3] Such a case differs from one in which a check is presented and left with the bank to be satisfied by the first incoming funds. Where the maker of a promissory note is a depositor with the bank which holds it, and the note is dishonored and duly protested, and indorsers notified, the bank is not bound to apply towards payment of the note any sum (though sufficient to pay the note) which the maker may subsequently deposit, generally, upon his current account. The making of such a deposit, and failure by the bank to apply it in payment of the note, does not discharge the indorser. It is optional with the bank whether to make such application or not; and the intention of the maker of the note, so far as it can be inferred from the circumstances, would clearly appear to be contrary to any such use of the money.[3]

Otherwise as to subsequent deposits.

(*b*) If there is anything in the agreement as to the deposit between the parties to the paper, or between the bank and depositor, that is inconsistent with the right of the bank to apply the deposit on the paper, the surety is not discharged because the deposit is not so applied. The bank is not in fault. It may be that the circumstances are such as clearly to preclude any obligation of the bank, even as towards third parties, to make an appropriation of funds in the bank at maturity, towards discharging a liability. For instance, if the customer gives a bond to the bank generally, though he may often afterward have general deposits equalling or exceeding the amount of such bond, yet the bank is not bound to apply them in discharge thereof, provided there be satisfactory evidence that such was not the intent of the parties, nor in their contemplation when they executed and delivered the paper. This would be the case, if it could be made to

[8] National Bank of Newburgh *v.* Smith, 66 N. Y. 271.

appear that the bond was intended to operate as a continuing security. Such intention, it has been said, may be shown or sufficiently inferred from proof of the language and conduct of the parties to the bond, though not occurring until after its execution.[4]

So if, by express agreement, or course of dealing between the bank and a depositor, a note of the depositor is not included in the general account between them, the bank cannot be compelled, for the benefit of a surety on the note, to apply towards its payment at maturity any balance of the depositor in its hands. Such application is at the option of the bank.[5]

Agreement or order interfering with lien.

And if, by reason of orders from or agreement with the depositor, the bank has no right to apply the funds in its possession to the note, the surety is not discharged by the lack of such appropriation.[6]

§ 563. **Cases holding that a Bank is not bound to apply a Deposit on Notes as against Sureties.** — In an action by a bank against sureties on a promissory note discounted by it, it is no defence that before maturity the principal directed the bank to pay the note at maturity out of his general deposit in the bank; that the bank failed to do so, and subsequently allowed the principal to check the money out of the bank, although it knew of the suretyship at all times, and the deposit was sufficient to pay the note. The surety has no interest in the debt the bank owes the maker of the note. It is not a question what the bank could do but what it is obliged to do. It could save the surety future hazard by suing the debtor as soon as the note is due, but it is not obliged to sue; it may wait until the maker is insolvent, and still the surety is not discharged. To say that the bank must apply the proceeds is to say it must collect, though no party has requested it to do so. A deposit debt is not like a collateral security

[4] Henniker *v.* Wigg, 4 Q. B. (Ad. & El.) 792.

[5] National Mahaiwe Bank *v.* Peck, 127 Mass. 298. See Glazier *v.* Douglass, 32 Conn. 393; Bank of Bengal *v.* Radakissen Mitter, 4 Moore, P. C. 140; Field *v.* Holland, 6 Cranch, 8; Brewer *v.* Knapp, 1 Pick. 332; Upham *v.* Lefavour, 11 Met. 174.

[6] Wilson *v.* Dawson, 52 Ind. 513 (1876).

deposited on purpose to secure the note; *that* the bank could not release without discharging the surety, but the bank would hold such security in trust for the surety. But a deposit is very different, and the fact that a depositor tells the bank to pay the note out of the deposit gave no new authority, and did not alter the case.[1] This has been pronounced a well reasoned case, but its title to such praise is hard to discover. It is fundamental that no one should, by want of ordinary care, injure another, if the bank at the maturity of a note held by it holds funds that, by the scratch of a pen, it could apply upon the note, thus securing itself; it is difficult to see why neglecting so easy a means of security is not as improper as giving up collateral expressly designated for the purpose of securing the note. The privilege of delay in bringing suit is not analogy, it is a matter much more to be hesitated about, involving expense and ill feeling. And the distinction made by the judge between money deposited to pay a note and an order from the depositor to apply an existing deposit to its payment, could only come from one determined to drive preconceived theory through any quantity of adverse facts.

In Bank of United States *v.* Corneal,[2] Story said, in substance, "when a note is payable at a bank, it is the maker's duty to be at the bank within business hours to pay the same." In this case there were no funds when the note became due. In National Mahaiwe Bank *v.* Peck,[3] Gray said that a deposit is the property of the bank, and not of the depositor, and the right to apply it to a debt is in the nature of set-off, which, in the absence of express agreement or appropriation by the debtor, the bank will not be required so to appropriate for the benefit of the surety. Where the balance is in favor of the depositor at the maturity of a note held by the bank, it is a case of mutual debts and credits, which, except in bankruptcy or insolvency, neither the depositor nor his surety can require to be set off.

[1] § 563. Second National Bank of Lafayette *v.* Hill, 76 Ind. 223 (1881).
[2] 2 Pet. 543.
[3] 127 Mass. 302.

§ 564. **Specific Deposit to pay Note or Acceptance.** — If the customer gives to his banker a specific sum for the express and declared purpose of enabling the banker to pay business paper of the customer made payable at the banker's, and if the banker at the time makes no objection to this arrangement, he cannot afterward apply this sum to any other purpose; as, for example, to reimbursing himself for any sum advanced by him to his customer on overdrafts, or to the payment of checks of the customer subsequently presented. Having received the sum for a certain specified purpose, he must hold it for and apply it to that purpose, and none other, at least so long as that purpose remains unaccomplished.[1]

Bank is agent of depositor, and cannot use deposit for other than the specified purpose.

If a note be made payable at a bank, and the maker deposits there in his own name a sufficient sum to meet the note, with verbal directions to the bank to use the funds for paying the note upon presentment, the bank is the agent, not of the payee, but of the maker of the note. If the bank refuses, for any reason, to make the payment upon due presentment and demand, the payee may have recourse to his legal remedies against the maker, as if the maker himself had refused. Thus, where the note in question was secured by a mortgage, and the refusal of the bank to honor it was upon an insufficient reason, it was nevertheless held that the payee might, as against the maker, proceed to foreclose the mortgage.[2]

(*a*) If money is deposited in a bank to pay a note drawn payable at the bank, the holder of the note can maintain an action against the bank for the fund.[2]

Note-holder may sue bank.

(*b*) But where the customer paid to his banker a certain sum, with the express contemporaneous stipulation that it should be used to take up a bill which he had accepted payable at the house of his banker's London correspondent, and afterward, upon the customer's becoming

Contra.

[1] § 561. De Bernales *v.* Fuller, 14 East, 590 n.; but see Moore *v.* Bushell, 27 L. J. Exch. 3.

[2] Pease *v.* Warren, 29 Mich. 9.

[3] Parsons on Com. Law, 130.

insolvent, and before the banker had advised his London correspondent to pay the bill, the banker appropriated the sum to meet the indebtedness of the customer to him, it was held that the drawers of the bill could not maintain an action against the acceptor's banker, on the ground of a lack of privity.[4] Though it might be inferred that, had the banker advised his correspondent to pay the bill, the decision might have been otherwise, and would then have been at variance with the foregoing Michigan case.

§ 564 A. **Certification of Notes.** — When notes are payable at a particular bank, there may be a usage for the bank to certify them. In such case the bank becomes the debtor, as upon the certification of a check, and the parties to the note are discharged.[1] If the bank discovers that the funds are insufficient, it may save itself and hold prior parties by taking up the note, presenting it at its own counter, refusing payment, and notifying the said prior parties within the lawful time.[2]

[4] Hill *v.* Royds, 8 L. R. Eq. 290.

[1] § 564 A. Mead *v.* Merchants' Bank, 25 N. Y. 148.

[2] Irving Bank *v.* Wetherald, 36 N. Y. 337.

CHAPTER XXXVI.

TITLE TO A DEPOSIT.

§ 565. Analysis.

A. As between Bank and Depositor.

§ 566. (1) Deposit in Savings Bank.

Is in trust; the property remains in the depositor.

§ 567. (2) Special and Specific Deposits.

When the identical thing deposited is to be restored or given to some third person, the property does not pass to the bank, as in case of a bill deposited "for collection," or money given the bank to pay a note.

§ 568. (3) General Deposit.

Money deposited in a commercial bank without special agreement, or any circumstance (such as being sealed up in a box) indicating an intent to have the money kept separate, creates no trust, but the relation of debtor and creditor between the bank and the depositor, and the title passes to the bank.

And when a deposit arises from collections, the proceeds form a general deposit, except when the directions are to "collect and remit," in which case the bank is an agent throughout, and except in Wisconsin, where the proceeds of collections are always in trust.

§ 569. (4) Deposit of Paper.

(*a*) Checks on the depositary credited as cash pass to the bank just as if it paid the money and then the holder deposited the cash, unless there is a special agreement to the contrary, or a usage, as in California, allowing the bank to return the check. But if the check is forged, or is credited as *paper*, the bank may return it; and if it is not drawn against funds, and the holder knew this, the credit is not deemed a payment by the bank.

§ 573. (*b*) Notes, Bills, Checks on other Banks, &c.

§ 583. If indorsed "For collection," or if credited as paper, the full title does not pass to the bank, though it may have a lien

§ 576. for advances on faith of the paper. But if credited as cash,

§ 583. the plain sense of the transaction is (1) that, as *against the depositor*, the title passes if the crediting as cash is with his consent, expressed, or implied from knowledge and acquiescence, or from a course of such dealing, and in case of

the bank's insolvency, he cannot reclaim the specific paper.
§ 578. (2) That, as against the bank, the title passes by such crediting, subject, however, to the condition, that, if the paper is
§ 583. not paid, it shall be returned to the depositor; this condition
§ 584. being imbedded in the transaction by the fact that banks
§ 585. continually claim and exercise this right, and by the justice of the case, since there is no consideration moving to the
§ 586. bank for its accepting any risk on the paper, and the security and despatch of business do not require any other rule. There is no counter-justice, for this rule is itself the one most favorable to the transaction of business; to which it may be added that discounting is an exclusive function of the board of directors, and cannot be exercised by the cashier or teller by crediting paper as cash, or in any other way; and further, that a credit of a note for its full amount is not a discount, for nothing is deducted; it is clearly only an ante-dated deposit, put in a lump with the money for convenience and in anticipation of its payment.

It will be found, on careful examination of the *facts* of the cases, and inquiring as to each, whether the question is against the depositor or the bank, and confining the broad language of the judges to the actual facts, that this rule covers and harmonizes the vast majority of the apparently so antagonistic decisions.

§ 583 *d*. But some remain really contrary.

If paper is received without instructions, the bank may elect
§ 583 *b*. to receive it for collection or deposit, and the title does not pass till it makes the election by crediting it as cash.

§ 659. Deposit of forged notes is no deposit. See § 633 D.

§ 662. Notes of insolvent banks received on deposit. See § 633 D.

(1) Subsequent insolvency is the loss of depositary bank.

(2) Precedent insolvency.

(*a*) If known to depositor, he must bear loss.

(*b*) If not known to parties, authorities conflict.

(*c*) Proceeds. See § 247.

When paper is collected, the general rule is, that the proceeds may be credited to the depositor on general account, and the bank becomes a debtor instead of a trustee. But this authority to credit such proceeds only continues while the bank is a going concern, and is revoked by its insolvency;
§ 568 *d*. and it is not allowed at all in Wisconsin, nor in any case
§ 567 *a*. where the instructions are to "collect and remit."

(*d*) Insolvency of Depositary Bank,

At time of deposit, known or unknown to the officers, is of itself no ground for recovery in preference to creditors in
§ 589. general; but the title does not pass if the money is kept separate from the bank's funds, or was never fully received before insolvency, nor if receiving the deposit was a fraud on the depositor.

(*c*) Fraud

§ 587 *a*. On the part of the depositor will prevent him from claiming
§ 569 *b*. that the title to paper deposited passed to the bank.

B. As between a Bank and Third Persons.

The bank's title to money or paper capable of identification by the true owner rests upon the principles of law that protect a *bona fide* holder for value, and, as the matter is very important, we give a brief analysis of the subject in a note on "Following Property."[1]

§ 590 *e*. (1) Money of P., deposited by D. in his own name, can be recovered by
P. if the bank still owes it; that is, if the bank is not a holder
§ 590 *b*, *c*. for value in relation to the money. And this is true, whether the identical money can be traced or not.

§ 590. Some cases hold that money identified can be recovered, even though
§ 590 *d*. it has been applied by the bank upon indebtedness of the depos-
§ 590 *e*. itor to it in ignorance of the true ownership. This we do not consider good law, unless the bank still owes the depositor an amount equal to that recovered. See the principles of note 1.

§ 567 *d*. Money received in good faith in payment of debt cannot be recovered by the true owner. Of course, where money comes to a
§ 590 *a*. bank's possession out of the usual course of business, and with no intent to deposit it, no title passes as against the real owner.

§ 593. (2) Paper indorsed "for collection" carries notice of the indorser's ownership.

§ 591. (3) If paper is deposited for collection, but not so marked, and is for-
§ 592. U. S. warded by the depositary to a correspondent, C., and by the latter

[1] § 565. *Following Property.* — A *bona fide* purchaser for value without notice has an *equity of the highest rank*, but it cannot resist a *legal title*, except in the case of money and negotiable paper, where the interests of commerce have constrained the law to adopt the rule of equity. See Lime Rock Bank *v.* Plimpton, 17 Pick. 161.

It results that, when the real owner, O., of property is wrongfully deprived of it, —

First. If the original property can be traced and identified, and (*a*) if it is not money or negotiable paper, O. can recover it wherever he finds it, even in the hands of a *bona fide* holder; but (*b*) if it is money or negotiable paper, including negotiable stocks, O. may recover it from the wrongdoer, or one claiming from him and having notice; but not against a *bona fide* holder for value, or one claiming from him, other than the wrongdoer or fraudulent payee.

Second. If one intrusted with property, P., substitutes other property for P., and the real owner can trace it into its new form, the substituted property will be subject to the trust or claim of O. in the hands of the trustee or agent, or one with notice, but not as against a *bona fide* holder for value, or one claiming from him, except the agent or trustee. And a debt due from D. to the trustee, that can be shown to be a transformation

§ 592 *b*. Mo. received without notice of the true ownership, and the depositary
§ 594. Ala. receives advances on the faith of such paper, or the correspond-
Cal. ent receives it in payment or suspension of a debt, or suffers
§ 595. Mich. balances to remain against the depositary on the credit of paper
§ 596. Ga. transmitted or expected to be transmitted in the usual course of
§ 597. Mass. dealing between the banks, such paper cannot be recovered from
§ 598. Eng. the correspondent by the true owner. The bank is a holder for value.

In New York an exception is made. One who takes paper as collateral security for a pre-existing debt is not a holder for value in
§ 599. the usual course of business; this is also the law in Pennsylvania, Tennessee, Wisconsin, and Connecticut. (New York, therefore, holds that taking paper as security for antecedent debt or a general balance will not protect a bank, but it must show some actual
§ 601. advance, or agreement for suspension of suit on a debt, or other
Kans. actual change of position in consequence of the transfer of the
§ 603. paper. The vast weight of authority, however, is against the New York exception, and her own decisions are in great confusion, and were said by the United States Supreme Court, in Swift *v.* Tyson, to be based on a case in which the point was not decided on the facts, viz. Coddington *v.* Bay, 20 Johns. 637. It seems to us perfectly clear that New York and her followers are wrong; the depositor could most easily prevent all trouble by indorsing "for collection." If, by neglecting this precaution, he enables the depositary to use the paper as if it were its own, and the C. bank will sustain injury if the paper turns out not to belong to the

of the original property, is within the meaning of the words "substituted property."

Third. If neither the original property nor its substitute can be traced into the hands of one from whom it can be recovered, then nothing remains but the liability of the trustee (T.) or agent. If T. is solvent, O. can claim in full, of course. If T. is insolvent, the best opinion is that O. has no better equity than any other creditor who has trusted T., though the contrary has been held.

It appears that a vendee can in two classes of cases get a good title in consequence of a sale by one who has no property in himself: —

(1) When an agent transfers the title of the real owner in virtue of authority from him, express or implied.

(2) When the circumstances create a new and independent title in the vendee; (*a*) by estoppel, as when the owner stands by and sees his property sold as that of another, and makes no objection; (*b*) by *bona fide* purchase for value of money or negotiable instruments.

Upon the above principles see Story, Eq. Jur. §§ 1258, 1259; May *v.* La Claire, 11 Wall. 217; Lime Rock Bank *v.* Plimpton, 17 Pick. 161; Story on Agency, §§ 229, 231.

In illustration: If A. (not having the legal title) sells O.'s horse with-

§ 582. depositary, then as between the two parties, the C. bank and the depositor, the latter has clearly enabled the first bank to impose upon C. The loss occasioned by the paper's not being what it appears to be must be borne by the one who put it forth with that appearance, not by him who received it in faith of its being what it purported.

The maxim, "Between two innocent parties, &c." applies here.

Every consideration of stability and certainty in commercial transactions points to the same conclusion. See further, note 1 *a*, and § 600.

(4) If the bank holds the paper or its proceeds for less than its amount, the true owner may recover the excess, or, if the paper is still in the bank's possession, he may recover that on paying the bank the amount of its claim upon the paper. See the end of note 1.

C. As between the Depositor and Third Parties, or between Third Parties.

Deposits in commercial banks.

(1) In case of insolvency of the depositary bank.

(*a*) If the title passed to the bank under A and B (above), the depositor or true owner can claim no preference to the general creditors.

(*b*) If the title did not pass,

(1) And the property can be identified in the hands of the bank, the owner is preferred.

§ 589 *b*. (2) If it cannot be identified, he has no better equity than any other person who has trusted the bank. Some

§ 567 *a*, *b*. cases, however, declare that a specific deposit may be

§ 568 *d*. recovered in full in preference to other claimants, although it has been mingled with the funds of the bank.

out authority, O. can assert his claim to the animal anywhere. But if A., a trustee, having the legal title, sells in violation of his trust, the *cestui* cannot follow the property into the hands of a *bona fide* holder for value; but if the transferee knew A. was violating his trust, the *cestui* can hold him as a new trustee. St. Eq. § 1258.

If a trustee wrongfully lays out the trust money in land, taking title to himself, equity will compel him to convey to the *cestui*.

If P. gives an agent money to buy a house, and he invests it in a carriage or in stocks, P. can maintain an action for that carriage or those stocks wherever he can find them, except in the hands of a *bona fide* holder for value. And where the principles of ratification apply, his suit may be at law.

One who accepts in good faith negotiable bonds deposited in a bank, transferred to him as a pledge by the cashier, acquires a good title, and a fraudulent recovery by the cashier cannot divest it. Ringling *v.* Kohn, 4 Mo. App. 59 (1877).

"As a general rule, where a trustee or agent has converted the subject

(2) Where an agent or trustee deposits money of his principal or *cestui*, the latter may claim the debt of the bank, if still due to the agent or trustee. It is not necessary, according to the best opinion, to identify the funds, if they can be traced
§ 590 *b*. through their changes so as to show that the debt which the bank owes the trustee is a transformation of the trust prop-
§ 590 *e*. erty. Of course, if the bank participates in the wrongful conversion of the property, that will create a liability; but
§ 355. if it is innocent in the matter, the question lies between third parties, and the *cestui* cannot recover from the bank beyond what is still due from it to the trustee.

(3) Miscellaneous points.

§ 604. A deposit is presumed to belong to the depositor, and the additions "Treas.," "Collector," &c. will not overcome the inference.

(*a*) A trustee or agent depositing in his own name bears any loss that occurs by failure of the bank.

(*b*) Deposit to husband and wife.

(*c*) Deposit to order of A. or B.

(*d*) Deposit to S., "Trustee for C. B.," may be drawn by the administrator of S.

(*e*) Assignment of savings bank book and notice to bank carries the deposit

§ 605. A specific deposit by A. to go to B. belongs to A., and not to B. until the bank binds itself to B.

§ 606. (4) A balance in bank passes by will under the words "money," "accounts due," &c.

(5) Gift of deposit.

See Analysis, § 607.

of his trust or agency into money, and pays the same in the due course of business, in discharge of his own indebtedness, to one ignorant of the nature of his title, the payee requires a perfect and indefeasible right against the real owner." Charlotte Iron Works *v.* American Exchange National Bank, 34 Hun, 26, 30; Stephens *v.* Board of Education, 79 N. Y. 183.

So always a transferee of negotiable paper takes at least as good a title as his transferrer, if the transaction between them is good, except that if the instrument is invalid between maker and payee, the latter cannot, by purchase from a subsequent *bona fide* holder, acquire any better right than he had at first. It is not necessary to extend the principle of protection so far as this, for it is good faith that is to be protected, and it cannot be very important to an innocent indorsee that there is *one person* incapable of taking his title, and so unlikely to become a buyer. Kost *v.* Bender, 25 Mich. 516; Sawyer *v.* Wiswell, 9 Allen, 42.

1[a] *Who is a Bona Fide Holder?* — No holder can enforce a negotiable instrument: — 1st. Against one incapable of making the contract it im-

ports[1] (as an infant, lunatic, married woman, or one under guardianship) 2d. Nor if the contract which the instrument represents is by statute expressly or by necessary implication declared void[2] (as for usury; but even in such case the indorser may be liable on his indorsement, though the original party is not bound;[3] and although the consideration between the original parties was illegal, if the statute does not declare the note or bill or other instrument *void*, a *bona fide* holder can recover[4] on it). 3d. Nor if the defendant has never given assent to the contract as it stands[5] (as if his signature is forged or obtained under duress, or the instrument has been materially altered, or if it was executed by an agent in excess of authority, the principal not being in fault).

(*b*) If the case does not fall within A., a holder of a negotiable instrument may recover upon it, even though originally obtained by fraud,[6] or without consideration,[7] or by theft,[6] or has been paid[8] or released,[9] provided he took it, —

1st. Before maturity. (A note overdue carries suspicion on its face; it may have been paid and left outstanding.)

2d. Without notice of dishonor or infirmity as between prior parties. (A note may be dishonored before it is due by refusal to accept, and one

[1] General principle of contract.

[2] Hall *v.* Wilson, 16 Barb. 548; Town of Eagle *v.* Kohn, 84 Ill. 292; Aurora *v.* West, 22 Ind. 88; Bailey *v.* Taber, 5 Mass. 286; Weed *v.* Bond, 21 Ga. 195.

[3] An indorser warrants the genuineness of all the signatures prior to his own, the competency of the parties, validity of the contract, &c.; in short, warrants that the instrument is good, and that he has title, and that it will be paid; and if it is not, and the transaction between the indorser and indorsee was free from fraud or illegality, and for value, the latter may recover on the indorsement. Bell *v.* Dagg, 60 N. Y. 528; Howe *v.* Merrill, 5 Cush. 83; Condon *v.* Pearce, 43 Md. 83; Hannum *v.* Richardson, 48 Vt. 508; 1 Parsons on Notes and Bills, 218, 188; Robertson *v.* Allen, 59 Tenn. 233. Even though the indorsee knew the makers of a note were married women when he took it, he may recover of the indorser. Erwin *v.* Downs, 15 N. Y. 575.

[4] Williams *v.* Cheney, 3 Gray, 215. See *Ultra Vires*, § 722.

[5] The Floyd Acceptance, 7 Wall. 666; Andover Bank *v.* Grafton, 7 N. H. 298; Bush *v.* Brown, 49 Ind. 573 (duress).

[6] See Brown *v.* Spofford, 95 U. S. 481; Goodman *v.* Simonds, 20 How. 343; Johnson *v.* Way, 27 Ohio St. 374; Central Bank *v.* Hammelt, 50 N. Y. 159; Ogden *v.* Marchand, 29 La. An. 61.

[7] Collins *v.* Gilbert, 94 U. S. 757; Bank of Pittsburg *v.* Neal, 22 How. 96; Baxter *v.* Ellis, 57 Me. 180; Ross *v.* Bedell, 5 Duer, 462; Mechanics' Bank *v.* Crow, 60 N. Y. 85; Belmont Branch Bank *v.* Hoge, 35 N. Y. 65; Sloan *v.* Union Banking Co., 67 Pa. St. 479; Davis *v.* Bartlett, 12 Ohio

knowing of this is ranged with one who takes after maturity,[10] and if the holder actually knew [11] of illegality, fraud, or defect of title between previous parties, or if he had *actual notice* [12] that *something was wrong*, though he did not inquire what, but wilfully shut his eyes to his suspicion, and the facts are really sufficient to impeach the validity of the instrument between former parties, he has no better position than his transferrer.)

3d. *Bona fide.* That is, in good faith. No matter if the holder be grossly negligent, it is not sufficient to impeach his position, but is only evidence for the jury on the question of bad faith. Kent (3 Comm. 103) follows Gill *v.* Cubitt, 3 Barn. & Cr. 466 (1824), in holding that, if the holder took under circumstances sufficient to excite the suspicion of a man of ordinary prudence, he could not recover; but the vast weight of modern authority in England and the United States is in favor of *bona fides* as the test.[13]

4th. For value, in the usual course of business. (One who acquires title by legal process, as a receiver or an assignee in insolvency, does not take in the regular course of business, and is in no better position than the immediately preceding party.[14]

If *money or property is paid*, or a debt *satisfied* or *suspended*, or a new *obligation or responsibility incurred*, in consequence of the transfer of the

St. 537. And though the indorsee *knew* the paper was given for accommodation, he may recover on it, though taken after maturity from one who took it *bona fide* before maturity, and the best opinion is that, even though he takes it with notice after maturity, and from the party for whose accommodation it was given, the want of consideration will be no defence to the maker; for he holds himself out as promising to pay any one who gives value, just the same as if it was paid to him, provided the conditions on which the accommodation is given are complied with, so far as the taker knew. Daggett *v.* Whiting, 35 Conn. 372; Small *v.* Smith, 1 Den. 583; Carruthers *v.* West, 11 Q. B. 143; Story on Bills, 188; Byles, (Shars.) 285; Daniel, Neg. Inst., §§ 726, 786.

[8] Swall *v.* Clark, 51 Cal. 227.

[9] Palmer *v.* Marshall, 60 Ill. 289.

[10] Crossly *v.* Ham, 13 East, 498.

[11] Hanauer *v.* Doane, 12 Wall. 342; Skilding *v.* Warren, 15 Johns. 270; Norvill *v.* Hudgins, 4 Munf. 496.

[12] Hamilton *v.* Vought, 34 N. J. Law, 187; Edwards *v.* Thomas, 66 Mo. 486; Perkins *v.* Challis, 1 N. H. 254.

[13] Smith *v.* Livingston, 111 Mass. 342; Edwards *v.* Thomas, 66 Mo. 483; Swift *v.* Tyson, 16 Pet. 1; Murray *v.* Lardner, 2 Wall. 110; Goodman *v.* Simonds, 20 How. 367; Seybel *v.* National Currency Bank, 54 N. Y. 288; Mabie *v.* Johnson, 15 N. Y. S. C. 309; Phelan *v.* Moss, 67 Pa. St. 62.

[14] Litchfield Bank *v.* Peck, 29 Conn. 384; Roberts *v.* Hall, 37 Conn. 205; Briggs *v.* Merrill, 58 Barb. 379; Billings *v.* Collins, 44 Me. 271.

instrument, the condition "for value" is fulfilled, and the holder protected against antecedent equities; but upon the question whether receiving paper as collateral security for a pre-existing debt is a taking "for value," authority is not uniform. New York, Wisconsin, Tennessee, and Pennsylvania hold that such a transaction will not protect the holder, for the debt still subsists, and nothing of value has been given up,[15] nor has the holder changed his position to his detriment.

In England, Maryland, Massachusetts, New Jersey, Vermont, Illinois, and in the United States Supreme Court, a pre-existing debt is a sufficient consideration;[16] paper taken on account of such debt is, by implication, conditional payment, and the debt is suspended till the paper is mature, and a negotiable instrument taken as collateral for an existent debt is taken for value.

"The transaction possesses both the cardinal ingredients of a valuable consideration; it is a detriment to the promisee and an advantage to the promisor, and it is no answer to say that the party who takes such bill or note is in the same condition as he was before. This is by no means certain. He has for the time foregone the collection of his debt, and in such matters time is of the essence of the transaction, and the debtor thereby gains time, — often a matter of the most vital importance."

The creditor is lulled into security by means of the instrument; there is no telling what reliance he may have put upon it, nor what arrangement he might have made if it had not been for taking the paper. Only by showing absolutely that taking the paper from him does not put him in a worse plight than while he had it to rely upon, can the plaintiff justly recover from the creditor holding such paper as collateral security; and if this were so because the paper is worthless, it would not benefit the plaintiff to regain it; and if it were so because the holder could recover from

[15] Moore *v.* Ryder, 65 N. Y. 441; Atlantic National Bank *v.* Franklin, 55 N. Y. 238; Wardell *v.* Howell, 9 Wend. 174; Knox *v.* Clifford, 38 Wis. 651; Bowman *v.* Van Kuren, 29 Wis. 220; Heath *v.* Silverthorn Lead Mining Co., 39 Wisc. 147; Richardson *v.* Rice, Cent. Law J., vol. vii., No. 12, p. 225 (Sept. 20, 1878); Roger *v.* Keystone National Bank, 83 Pa. St. 248; Cummings *v.* Boyd, 83 Pa. St. 372. But in Grocers' Bank *v.* Penfield, 14 N. Y. S. C. 281, an accommodation holder indorsed notes to the bank to secure a balance, and the court held that an agreement for extension of time was implied. Peacock *v.* Purcell, 14 C. B. N. S. 728.

[16] Poirier *v.* Morris, 20 Eng. L. & Eq. 103; Blanchard *v.* Stevens, 3 Cush. 168; Allaire *v.* Hartshorne, 1 Zab. 665; Swift *v.* Tyson, 16 Pet. 1; Goodman *v.* Simonds, 20 How. 343; McCarty *v.* Roots, 21 How. 432; Manning *v.* McClure, 36 Ill. 489; Atkinson *v.* Brooks, 26 Vt. 574; Maitland *v.* Citizens' National Bank, 40 Md. 540 (1874); 1 Parsons on Notes and Bills, 226; Daniel, § 827 *et seq.*; Oates *v.* First National Bank of Montgomery, 100 U. S. 239 (collateral for previous debt; extension of time actually granted).

his debtor who transferred the paper to him, then litigation will be saved by referring the plaintiff to the debtor, or still further back, i. e. to the party actually in fault, if responsible, and if not, the innocent subsequent parties should not suffer for reliance upon the face of genuine paper.

This latter rule is certainly far better calculated to build up the stability of negotiable paper, and to facilitate commerce by increasing the certainty that business transactions will be sustained by the law as being what they appear to be. In short, the latter rule favors prevision, while the former clouds it, and no injustice is done to the parties held on such paper comparable to the social inconvenience that would follow from insecurity in financial dealings; and all the extra pressure brought to bear on such parties is in the direction of producing greater care on their part in the issuing and keeping of their paper.)

There does not, however, seem to be any reason why the true owner of negotiable paper may not recover it, on payment of the amount for which it is held as security.[17] The absolute title to the whole is not justly in the bank holding it as collateral for a debt only equal to a fraction of its amount. All that such holder can claim is, that, so far as reliance has been put on the paper *bona fide*, it shall be held harmless.

§ 566. **Deposit in Savings Bank.** — In case of a deposit in a savings bank, the property remains in the depositor, and the bank is a trustee.[1]

§ 567. **Special and Specific Deposits.** — When the very money or other thing deposited is to be restored,[1] or is given to the bank for some specified and particular purpose,[2] as to pay a certain note, or to act as agent for the collection of bills or notes deposited, the property does not pass from the depositor. When, however, the money is collected and credited, it becomes a general deposit,[3] unless the instructions are to *col-*

[17] New York M. Iron Works *v.* Smith, 4 Duer, 362; White *v.* Springfield Bank, 3 Sand. (S. C.) 222. See the principle in Angle *v.* N. W. &c. Ins. Co., 92 U. S. 342.

[1] § 566. Osborne *v.* Byrne, 43 Conn. 155; Bunnell *v.* Collinsville Savings Society, 38 Conn. 203; Simpson *v.* Savings Bank, 56 N. H. 466; Hall *v.* Harris, 59 N. H. 71; Sawyer *v.* Hoag, 17 Wall. 610; Newark Savings Institution Case, 28 N. J. Eq. 552; Stockton *v.* Mechanics & Laborers' Savings Bank, 32 N. J. Eq. 163; Burrill *v.* Dollar Savings Bank, 92 Pa. St. 134; Huntington *v.* Savings Bank, 96 U. S. 388.

[1] § 567. State *v.* Clark, 4 Ind. 316; Keene *v.* Collier, 1 Met. 417 (Ky.).

[2] Brahm *v.* Adkins, 77 Ill. 263; National Bank *v.* Speight, 47 N. Y. 668; Parker *v.* Hartley, 91 Pa. 465.

[3] Marine Bank *v.* Fulton Bank, 2 Wall. 556.

lect and remit, and then, there being no authority to credit, the bank acts as agent throughout.

(*a*) C. sent a bill to the D. Bank for *collection, with specific instructions to remit the proceeds.* The bank received the money, and forwarded its draft to C. on a New York bank; this was dishonored, and, the D. Bank becoming insolvent, the receiver was ordered to pay C. in full in preference to the general creditors.[4] The title to the bill did not pass, and the proceeds were held in trust. When D. receives the funds of C. he is deemed to hold them in a fiduciary capacity as bailee, or trustee, unless there is an understanding, express, or implied from the course of dealing or usage of business, that the same shall be turned into a debt.[5]

M. left a draft with bank H. for collection. H. sent it to bank B., received credit, and drew on B. for the full amount. Before paying M., H. assigned for creditors. Held that M. could recover in full from the assignee, as for a trust, though the specific funds could not be traced.[6] No change of state or form can divest trust property of its character as such. An abuse of a trust can confer no rights on the party abusing it, or on those claiming in privity with him. "If the proceeds of the trust can be traced into the estate of the defaulting agent or trustee, this is sufficient."[7] JJ. Cassoday and Taylor dissented, saying, "An equitable lien exists only when the trust money is directly or indirectly traceable to the fund sought to be charged."[6] Not only must it be traced to the estate for the agent, but to the fund in the hands of the assignee, and in this case it seemed to have been dissipated before the estate became insolvent.

Right against other creditors in case of insolvency.

[4] People *v.* Bank of Dansville, 39 Hun, 187 (N. Y.).

[5] Libby *v.* Hopkins, 104 U. S. 307; People *v.* City Bank, 96 N. Y. 32.

[6] McLeod *v.* Evans, 66 Wisc. 401 (August, 1886). See National Bank *v.* Insurance Co., 104 U. S. 54; Van Alan *v.* American National Bank, 52 N. Y. 1; Farmers & Merchanics' National Bank *v.* King, 57 Pa. St. 202; People *v.* City Bank of Rochester, 96 N. Y. 32; Peak *v.* Ellicott, 30 Kans. 156.

[7] Story, Eq. Jur., § 1258.

One who holds property expressly for a particular purpose cannot apply it to any other, and a bank cannot have a lien for a general balance on property deposited specifically.[8]

(*b*) When money is delivered to a bank for the expressed purpose of paying a note, the relation of principal and agent is created, not that of debtor and creditor; the deposit is a trust fund, and in case of an assignment for creditors this fund does not pass as assets of the bank, but may be recovered in full.[9] But if the money has been mingled with the funds of the bank, as is usually the case, we do not see any reason why the depositor should be preferred above any other. He has trusted the bank, so have the others. See the principle in the Illinois Trust & Savings Co. Case, 21 Blatchf. 275. It is the usual custom to receive money to pay a note in the same way as on general deposit, and to mingle it with the funds of the bank, and there does not seem to be any substantial difference except that the bank cannot claim a lien upon such funds. The plain fact seems to be that the bank owes the amount of the note to the note-holder, payable at its maturity, and it is hard to see why he should be preferred to any other person having money in the bank's possession. However, the word "trust" seems to have led to the giving of preference in these cases, even though the funds are handled (as a matter of business fact) in just the same way as where the word "debt" is applied.

(*c*) A., the maker of a note payable at the B. bank, gave the bank a check expressly to pay the note, and the bank charged the check to A.'s account, and marked it "Paid," and failed before actually paying the note. It was held that the funds were held in trust by the receiver to pay the holder of the note in full.[10] When, however, a bank, in pursuance of an order from the depositor, sends to another bank money to pay a bill of the depositor, and the first bank fails before the bill comes due, there is no reason to allow the creditors of the

[8] Davis *v.* Bowsher, 5 Term, 488; Jarvis *v.* Rogers, 15 Mass. 389. A pledge for a special loan cannot be retained for a prior debt.

[9] Ellicott *v.* Barness, 31 Kans. 170; Peak *v.* Ellicott, 30 Kans. 156.

[10] People *v.* City Bank, 96 N. Y. 32; citing Libby *v.* Hopkins, 104 U. S. 303.

first bank to claim any share in such funds; they have gone from its possession, and been appropriated to the bill, and put in the hands of the second bank for the purpose of paying it; it has become a deposit in the second bank, not in the first.[11]

A bank transmitting money acts as agent.

A city treasurer drew his checks on the city's banker, M., with instructions to transmit the amount to the R. Bank in New York to pay a debt of the city there. Judge Dillon said: "It is my judgment that the relation between the Missouri Bank and the city, as respects the money deposited with the Bank of the Republic, was not that of debtor and creditor strictly, but that of principal and agent, with the duties and liabilities of the latter, and not those of the former relation. The moneys deposited by the Missouri Bank in its name with the Bank of the Republic were, as between the former bank and the city, trust moneys, and in equity they belong to the city." [12]

Proceeds of collection diverted to pay debt of the collecting bank, the creditor bank, being innocent, holds.

(*d*) The Charlotte Iron Works held a draft payable by D. on the 19th of December, and sent it to the C. bank for collection. The latter forwarded it to the A. bank, ordering it to send the proceeds to the E. bank to pay the C.'s debt to the E. The A. collected and remitted to the E., stating that the funds were to be applied to the C.'s indebtedness to the remittee. The E. accordingly credited to the C.'s account the money received from the payment of the draft sent by A. The collection by A. was on the 19th, the cash on its draft was received through the clearing-house on the 20th, and at three o'clock on the 19th the C. had closed its doors insolvent. As the E. bank had in good faith applied the fund on the indebtedness of the C. to it, receiving it as payment on the same, just as if cash had been remitted to it by A. for that purpose, it was declared to be a *bona fide* holder for value, and entitled to retain the money.[13]

[11] Farley *v.* Turner, 26 L. J. N. S. 710.

[12] St. Louis *v.* Johnson, 5 Dill. 241.

[13] Charlotte Iron Works *v.* American Exchange National Bank, 34 Hun, 26. See Indig *v.* National City Bank, 80 N. Y. 100; Turner *v.* Bank, 3 Keyes, 425; Justh *v.* National Bank, 56 N. Y. 478.

§ 568. **Money deposited in a Commercial Bank, and the Proceeds of Collection.** — The simple deposit of money on account is a general deposit, and transfers the ownership of the money to the bank. The ordinary relation existing between a bank and its customer, if not complicated by any further transaction than that of the depositing and withdrawing of moneys by the customer from time to time, is simply that of debtor and creditor at common law. The original and every subsequent deposit by the customer is in strict legal effect a loan by the customer to the bank. Efforts have been made to hold banks to the duties and responsibilities of trustees in respect to the sums placed on deposit with them, also to hold them as agents of the depositor, but these have uniformly failed both in England and in the United States; and the general doctrine as laid down above is sustained by a great weight of authority.[1]

When title passes to the bank.

(*a*) If coin or currency, "not in a sealed packet or closed box, bag, or chest, is deposited with a bank or banking corporation, the law presumes it to be a general deposit, until the contrary appears; because such deposit is esteemed the most advantageous to the depositary, and most consistent with the general objects, usages, and course of business of such companies or corporations. But if the deposit be made of anything sealed or locked up, or other-

Deposit presumed to be general.

[1] § 568. English cases: Foley *v.* Hill, 2 H. L. Cas. 39; Crosskill *v.* Bower, 32 Beav. 86; Carr *v.* Carr, 1 Mer. 541 n.; Bishop *v.* Countess of Jersey, 2 Drew. 143; Devaynes *v.* Noble, 1 Mer. 541; Bellamy *v.* Majoribanks, 8 Eng. L. & Eq. 517; Sims *v.* Bond, 6 Barn. & Ad. 392; 2 Nev. & Man. 608; Watts *v.* Christie, 11 Beav. 546; Pott *v.* Clegg, 16 M. & W. 321; In re Agra & Masterman's Bank, Ex parte Waring, 36 L. J. Ch. 151; Grant on Bankers and Banking, p. 4. American cases: National Bank *v.* Eliot Bank (in which, however, there is a long dissenting opinion, delivered by Abbott, J.), 20 Law Rep. 138; Commercial Bank of Albany *v.* Hughes, 17 Wend. 94; Bullard *v.* Randall, 1 Gray, 605; Chapman *v.* White, 2 Seld. 412; Downes *v.* Phœnix Bank, 6 Hill, 297; Foster *v.* Essex Bank, 17 Mass. 479; Bank of Northern Liberties *v.* Jones, 42 Pa. St. 536; Marsh *v.* Oneida Central Bank, 34 Barb. 298 (citing many authorities); Curtis *v.* Leavitt, 15 N. Y. 9; National Bank of the Republic *v.* Millard, 10 Wall. 152; Marine Bank *v.* Fulton Bank, 2 Wall. 252.

wise covered or secured in a package, cask, box, bag, or chest, or anything of the kind of or belonging to the depositor, the law regards it as a pure or special deposit, and the depositary as having the custody thereof only for safe-keeping and the accommodation of the depositor."[2] All the sums paid into the bank on general deposit, by the same or different depositors, form one blended fund.[3] So soon as the money has been handed over to the bank, and the credit given to the payer, it is at once the proper money of the bank. It enters into the general fund and capital, and is undistinguishable therefrom. Thereafter the depositor has only a debt owing him from the bank; a chose in action, not any specific money, or a right to any specific money.[4]

(*b*) A deposit is not special unless made so by agreement or directions of the depositor, or by such circumstances as being enclosed in a box, or other matter indicative of intent not to make a general deposit, or unless made in a particular capacity which indicates such intent.[5] A public deposit blended with the general funds of the depositary,[6] or money deposited by a receiver appointed by the court,[7] or a deposit in the name of C. D., "Clerk,"[8] does not constitute a special deposit.

(*c*) Two banks, the C. and the I. agreed that the C. should act as the I.'s agent for clearing-house purposes, the I. to keep on deposit with the C. a sum to meet the checks put through.

[2] Dawson *v.* Real Estate Bank, 5 Ark. 297.

[3] Devaynes *v.* Noble, 1 Mer. 541; Bodenham *v.* Purchas, 2 Barn. & Ald. 39; Henniker *v.* Wigg, 4 Q. B. (Ad. & El.) 792; Commercial Bank of Albany *v.* Hughes, 17 Wend. 94.

[4] Marine Bank *v.* Fulton Bank, 2 Wall. 252; Thompson *v.* Riggs, 5 id. 663; National Bank of the Republic *v.* Millard, 10 id. 152; Ætna National Bank *v.* Fourth National Bank, 46 N. Y. 82; Carr *v.* National Security Bank, 107 Mass. 45; First National Bank *v.* Ocean National Bank, 60 N. Y. 278.

[5] Brahm *v.* Adkins, 77 Ill. 263; Ruffin *v.* Commissioners, 69 N. Car. 498; Neely *v.* Rood, 54 Mich. 134.

[6] Otis *v.* Gross, 96 Ill. 612.

[7] Southern Devel. Co. *v.* Houston, 27 Fed. Rep. 344.

[8] McLain *v.* Wallace, 103 Ind. 562.

Held, that such deposits became the property of the C., and upon the C.'s bankruptcy the balance vested in the C.'s assignee. The relation was simply that of debtor and creditor between the banks.[9]

(*d*) When deposits arise from collection on behalf of a correspondent the relation of debtor and creditor is created.[10] But in Wisconsin a collecting bank holds the proceeds in trust, and payment must be made in full in preference to general creditors, even though the specific money cannot be traced.[11] In Illinois, if the proceeds of collection are mingled with the other funds of the bank, they are governed by the rules relating to general deposits, and if they depreciate it is the bank's loss.[12]

No authority to credit proceeds of collection after insolvency.

A bank,[13] upon receiving from L. a draft indorsed "for collection on his account," provisionally credited him with it, presented it for payment, and surrendered it to the drawee on receiving his check for the amount; but instead of demanding the money thereon, had the checks certified as good, and on the same day suspended payment. The next day the check was collected and the money mingled with other money in the hands of the receiver. It was decided that he held it in trust for L. The bank had no authority to take anything but money. Receiving a check and having it certified was not a completion of its agency to collect. That duty terminated only with payment of the check, and only then did the authority to credit

[9] Phelan *v.* Iron Mountain Bank, 4 Dillon, 88 (1877).

[10] Phœnix Bank *v.* Risley, 111 U. S. 125; People *v.* Merchants & Mechanics' Bank, 78 N. Y. 269. If the depositor of the paper has an account at the bank, the proceeds are rightly credited to him on general account; if he is not a general depositor, the bank may start an account with the proceeds. Marine Bank *v.* Rushmore, 28 Ill. 463; Tinkham *v.* Hayworth, 31 Ill. 519.

[11] McLeod *v.* Evans, 28 N. W. Rep. 173.

[12] Marine Bank *v.* Rushmore, 28 Ill. 463.

[13] Levi *v.* National Bank of Missouri, 5 Dillon, 104 (1878); First National Bank *v.* First National Bank of Richmond, 76 Ind. 561 (1881). So in Texas collection subsequent to insolvency is held by the bank in trust. German American Bank *v.* Third National Bank, 2 Texas L. J. 150.

arise, if the bank was still a going concern. But the bank became insolvent before the agency was completed and the money received, so that no authority existed to credit the money on general account, and it was still trust money at the time it went into the hands of the receiver, and, being clearly traced into his hands, may be recovered.

§ 569. **Check on Depositary. (Ala., N. Y., U. S., Cal., N. J.)** — When a check is presented for deposit drawn on the depositary bank, the bank may refuse to pay it, or take it conditionally by express agreement, or by usage if such a one exists, as in California;[1] but otherwise, if it pays the money, or gives credit to the depositor the transaction is closed between the bank and the depositor, unless the paper proves not to be genuine, or there is fraud on the part of the depositor.[2] The giving of credit is practically and legally the same as paying the money to the depositor, and receiving the cash again on deposit.[3] The intent of the parties must govern, and presenting a check on the bank, with a pass-book in which the receiving teller notes the amount of the check, is sufficient indication of intent to deposit, and to receive as cash.[4] So a credit on the deposit ticket is as significant an act of receiving the check as cash as is a credit on the pass-book or the books of the bank.[5] California contra.[6]

[1] § 569. In San Francisco there is a legally sanctioned usage to return a check deposited in the bank on which it is drawn, if the fact that the drawer has not sufficient funds to his credit is discovered during banking hours of the day of deposit. National Gold Bank *v.* McDonald, 51 Cal. 64.

[2] Oddie *v.* National Bank, 45 N. Y. 735. Mistake of the officer making the credit, as to the funds of the drawer, will not give the bank any right to repudiate the transfer. Chambers *v.* Miller, 13 Com. B. N. S. 125; National Bank *v.* Burkhardt, 100 U. S. 686; Levy *v.* United States Bank, 4 Dall. 234. Where the depositor knows that the drawer has not sufficient funds, the bank is not held to have paid the check. Peterson *v.* Union National Bank, 52 Pa. St. 206.

[3] Market *v.* Hartshorne, 3 Keyes, 137; Levy *v.* Bank, 4 Dall. 234; Bolton *v.* Richard, 6 Term, 139; City National Bank *v.* Burns, 68 Ala. 267.

[4] See authorities in the two preceding notes.

[5] Market *v.* Hartshorne, 3 Keyes, 137.

[6] National Gold Bank *v.* McDonald, 51 Cal. 64.

In Alabama, a check drawn on the C. bank was credited on the depositor's pass-book and on the books of the bank, and put on the file of paid checks. Held that the depositary could not return the check on discovery that it was an overdraft, and the drawer insolvent.[7]

Credit of check on the depositary is payment.

But if the check was not drawn against funds and the holder knew it, the credit is not deemed a payment by the bank.[8] If the holder has knowledge that the drawer has no funds, and has no just reason to think the check will be honored in the absence of funds, he is guilty of fraud, especially if he knows the drawer is insolvent and the bank does not. So it was argued. The Chief Justice said, "If we concede the proposition in its broadest terms, knowledge of the want of funds must be traced to the holder. It is fraud which is imputed to him, and the scienter should be clearly proved."[8]

If the holder knows there are no funds his demand may be fraud, but the scienter must be clearly proved.

§ 570. **In New Jersey** the doctrine is very clearly stated in a case[1] where two checks on the depositary were in dispute. "They were received and credited in a cash account as cash, in part as payment of an overdraft, and in part to be drawn against. They were received and credited in the same way as bills or notes of other banks. *By such crediting, the bank became the owner of these checks, as they do of legal tender notes or bank bills, so deposited.* And had the defendants failed the next day, the plaintiffs could not have demanded these identical checks as their property, left for collection, against a receiver or an assignee in bankruptcy; the plaintiffs had *received the price of these checks by having it credited on their overdraft, and by drawing for it.*"

§ 571. **In New York** it is held that the bank is bound at all times to know the condition of the depositor's account; that if the check of a depositor is presented at the bank on

[7] City National Bank of Selma *v.* Burns, 68 Ala. 267 (1880).

[8] Peterson *v.* Union National Bank, 52 Pa. St. 206.

[1] § 570. Titus *v.* Mechanics' National Bank, 35 N. J. Law, 592. See the same decision in Hoffman *v.* First National Bank, 46 N. J. Law, 604; Terhune *v.* Bank, 34 N. J. Eq. 367.

which it is drawn, and payment of the sum called for is made thereon, or if it is offered for deposit and credit is given upon the bank-book of the person offering it, the bank cannot afterward recover back the amount paid, or refuse to recognize the credit given, because the check proves to be an overdraft. "The bank," say the court, "has always the means of knowing the state of the account of the drawer; and if it elects to pay the paper it voluntarily takes upon itself the risk of securing itself out of the drawer's account or otherwise." If the check be presented for deposit, it will naturally be presented to the "receiving," instead of to the "paying" teller; but this fact was declared not to affect the foregoing rule. The receiving teller has equal power with the paying teller to discover the condition of the drawer's account before giving the credit. A bank simply receiving a check drawn upon itself by one of its depositors, and offered for deposit by another of its depositors, and giving credit upon the latter depositor's bank-book in the ordinary manner, is estopped afterward to say that it received the check only for collection, though it may by express words make the receipt and credit conditional.[1]

§ 572. **In Pennsylvania** it is held that the officers of the bank, having dealt with the check in the ordinary form, have placed the bank only under the ordinary obligation; to wit, that of collecting the check in due course of business for the benefit of the depositor. The collection is not complete, and the bank does not become indebted to the depositor for the amount, until the credit has been actually transferred.[1] But nevertheless the depositor enjoys one advantage in this case which he would not enjoy if the check were upon another bank. The duty of applying the funds of the drawer to meet it accrues as soon as the bank receives it. If there are then, or if there should subsequently be, deposited, while the bank

[1] § 571. Oddie *v.* National City Bank, 45 N. Y. 735.

[1] § 572. Peterson *v.* Union National Bank, 52 Pa. St. 206; National Gold Bank *v.* McDonald, 51 Cal. 64; Boyd *v.* Emmerson, 2 Ad. & El. 184; Kilsby *v.* Williams, 5 Barn. & Ald. 815. See Pollard *v.* Ogden, 2 E. & B. 459.

holds possession of the check, funds to the credit of the drawer to the amount of the check, the bank is bound to apply them to the payment of this in preference to any other check which shall be presented, or probably to any other claim or lien which shall accrue, *after* the deposit of this check. Liens already fastened upon the drawer's balance will, of course, be entitled still to retain their precedence. Though, where the drawer was indebted to the bank at the time, and the bank, without mentioning this fact, simply promised the depositor to hold the check for the purpose of applying upon it any deposits that might be thereafter made, it was held that such subsequent deposits must be first devoted to the payment of the check, although the indebtedness still remained undischarged and unsecured.[2] But if at the time when the holder hands in the check he demands to have it placed to his credit, and is informed that it shall be done, or if he holds any other species of conversation which practically amounts to demanding and receiving the promise of a transfer of credit as equivalent to an actual payment, the effect will be the same as if he had received his money in cash, and the bank's indebtedness to him for the amount will be equally fixed and irrevocable.[2] If a check is credited as cash to a depositor, and interest paid on his balance, of which the check is a part, it is a cash deposit.[3]

§ 573. **Paper deposited in a Commercial Bank.** — If checks, notes, &c. are deposited for collection, credited to the depositor on general account, and *drawn against*, the bank is holder of the paper for value, and if it becomes insolvent, it forms part of its assets.[1] And if the drawer's account is overdrawn at the time of discounting a draft, and at its maturity, the court will hold the consideration good for the entire amount of the draft,

When title passes to the bank. Paper in general.

[2] Boyd *v.* Emmerson, 2 Ad. & El. 184.

[3] Foulker *v.* Union Banking Co., 6 W. N. Cas. (Phil.) 109.

[1] § 573. In re Bank of Madison, 5 Biss. 515; Ayres *v.* Farmers & Merchants' Bank, 79 Mo. 421; St. Louis *v.* Johnson, 27 Fed. Rep. 213; Balbach *v.* Frelinghuysen, 15 Fed. Rep. 675, which last goes a little beyond the principle of *bona fide* holder for value.

and not inquire into the amount drawn upon the strength of it.[2]

§ 574. **New York.** — In the New York Court of Appeals Judge Andrews said: "The general doctrine, that upon a deposit being made by a customer in a bank, in the ordinary course of business, of money, or drafts or checks *received and credited as money*, the title to the money, or to the drafts or checks, is immediately vested in and becomes the property of the bank, is not open to question. The transaction, in legal effect, is a transfer of the money, or drafts, or checks, as the case may be, by the customer to the bank, upon an implied contract on the part of the latter to repay the amount of the deposit upon the checks of the depositor. The bank acquires title to the money, drafts, or checks, on an implied agreement to pay an equivalent consideration when called upon by the depositor in the usual course of business."[1]

M., who kept an account with the M. and M. Bank of Troy, deposited with that bank a check given for value, drawn by defendant, payable to the order of M., and indorsed by him in blank.[2] Said bank credited the amount of the check in M.'s pass-book, which was returned to him, and on the same day it mailed the check to plaintiff, its correspondent in New York and its creditor, to be credited on account, and it was so credited. M. stopped payment of the check, and when plaintiff caused payment to be demanded of the drawee it was refused. Notice of presentation and protest was given to defendant, who subsequently paid the amount to M. In an action upon the check, held that upon the deposit the M. and M. Bank became owner of the check, and as such could and

[2] First National Bank *v.* Crawford, 2 Cin. S. C. Rep. 125.

[1] § 574. Cragie *v.* Hadley, 99 N. Y. 133; Metropolitan National Bank *v.* Loyd, 25 Hun, 101; 90 N. Y. 530; and see Brooks *v.* Bigelow, 142 Mass. 6.

[2] Metropolitan National Bank of New York *v.* Loyd, 90 N. Y. 534. And see Scott *v.* Ocean Bank in City of New York, 23 N. Y. 289; Story on Bailment, § 88; Keene *v.* Collier, 1 Met. (Ky.) 415; Brahm *v.* Adkins, 77 Ill. 263; Chapman *v.* White, 6 N. Y. 412; National Bank of Republic *v.* Millard, 10 Wall. 152; In re Franklin Bank, 1 Paige, 254; Clark *v.* Merchants' Bank, 2 N. Y. 380.

did give a perfect title to its transferee, and that plaintiff was entitled to recover. It is not disputed that M. held the check as owner; it was his property to do with as he pleased. He had held other checks. Some of these he placed in the Troy bank for collection; others he deposited, and took credit therefor as cash upon his pass-book. As to the first, he could give and revoke his own directions as often as he chose, but as to *the others, when they were by his direction credited to him, the title passed to the bank, and they were not again subject to his control.*[2] This we understand to be the result of the general rule applicable to such transactions.

If a bill or draft be forwarded by its owner for collection, and by order or custom of dealing the party receiving it places the amount to the credit of the owner, and the owner thereupon draws, or is entitled to draw, against the same as cash, this works a transfer of title, so that the owner cannot follow the paper or its proceeds in the hands of a third party receiving it in good faith and due course of business from the agent for collection.[3] "It would be a singular mode of transacting business to give credit for securities and allow the funds thus constituted to be drawn against, and the drawer at the same time to retain the entire legal or equitable interest in the securities of which the fund was composed.[3] Briggs gave a New York bank (C.) a check on the J. bank. The C. bank sent the check to the J., and, under an agreement existing between the two banks, the latter charged the check to the drawer, and credited the amount to the C. bank. Held that these facts changed the ownership of the check as between the two banks, that the C. bank must be deemed to have "accepted the responsibility of the drawee upon its credit in the collection account as payment of the check," and therefore Briggs could recover the amount of the C. bank.[4]

§ 575. **United States.** — The opinion[1] of Justice Wallace in the United States Circuit Court is to the same effect:

[3] Clark *v.* Merchants' Bank, 2 N. Y. 380.

[4] Briggs *v.* Central National Bank, 89 N. Y. 182.

[1] § 575. St. Louis *v.* Johnson, 27 Fed. Rep. 243 (1884).

"When a sight bill is deposited with a bank by a customer at the same time with money or currency, and *a credit is given him by the bank for the paper, just as a like credit is given for the rest of the deposit, the act evinces unequivocally the intention of the bank to treat the bill and the money or currency, without discrimination, as a deposit of cash*, and to assume towards the depositor the relation of a debtor, instead of a bailee of the paper. If the customer assents to such action *on the part of the bank by drawing checks against the credit or in any other way*, he manifests with equal clearness his intention to be treated as a depositor of money, and, as such, as a creditor of the bank, instead of a bailor of the paper. Under such circumstances, it should be held that the bank acquires title to the paper just as it would to a deposit of money. The intention of the parties in the particular transaction may be ascertained from the course of their previous dealings. When it appears that it has been the uniform practice between the parties in their past dealings to treat deposits of paper as deposits of cash, their intention to do so in the particular transaction should be inferred, in the absence of new and inconsistent circumstances. It is quite certain that bankers do not invariably credit their customers for sight paper as for cash, but are generally influenced by the financial responsibility of the customer, or the drawee of the paper, or both. . . . Some significance must be attached to a credit entry of the bill upon the books of the bank as cash, and the natural implication would seem to be that the bank, by making such an entry, assumes to receive the bill as money. Correlatively, if the depositor understands that the bank proposes to receive the paper as money, and assents, expressly or by acquiescence, it would seem that he consents to part with the title to the paper."

The facts of the case are thus stated by the judge: "For several years prior to the 5th of May, 1884, the plaintiff kept an account with the Marine National Bank of the city of New York, making deposits with and drawing checks upon the bank from time to time. On the fifth day of May, 1884, the plaintiff deposited with the bank a sight draft for $17,835,

dated that day and drawn by the plaintiff upon the treasurer of the Atchison, Topeka, and Santa Fé Railroad Company, of Boston, Mass., which company was indebted to the plaintiff in the amount of the draft. The bank was insolvent at the time, but forwarded the draft to its collecting agent at Boston, and the amount was paid to such agent by the drawee on the seventh day of May, after the bank had failed and closed its doors. *On several occasions during the time the plaintiff kept an account with the bank, the plaintiff deposited similar paper at the same time with money, and the bank credited the plaintiff upon its books, and also upon the pass-book of the plaintiff, with the amount of such paper as a cash item.* The plaintiff also entered the amount of such drafts in a memorandum of deposits, kept in its check-book among cash items. The plaintiff has never drawn against the credits given for sight drafts, but never had occasion to do so. There was no express arrangement or understanding between the plaintiff and the bank that such deposits should be treated as cash. When the draft in suit was deposited, it was sent to the bank by a messenger boy, but the plaintiff's pass-book was not sent, having previously been left with the bank for the purpose of being written up. The amount of the draft was credited by the bank on its own books to the plaintiff as a cash item; but it was not entered in the pass-book of the plaintiff until after the failure of the bank, and then without the plaintiff's knowledge. The defendant, who is the receiver of the bank, had notice of the plaintiff's rights before the proceeds of the draft were paid over to him by the collecting agent at Boston."

Here, as in the previous cases, the question was, Had the title passed as against the depositor? If the title was still in him when the draft was paid, then he could recover from the receiver, since the proceeds were not mingled with the assets before the receiver took possession of them, but were capable of identification and tracing to his possession.

"A deposit being made by a depositor in a bank, in the ordinary course of business, of money, or drafts or checks received and credited as money, the title to the money or

drafts or checks is immediately vested in and becomes the property of the bank."[2]

§ 576. If A. indorses to B. certain bills "for collection," and, based on the possession of such bills, being accepted and soon to mature, B. allows A. to realize the proceeds of the bills before their payment, by drafts upon B. in anticipation of the collection, there seems every reason to allow B. to hold the bills against A. until the advances are repaid. The case is not distinguished from any other advance on collateral security, and B. should have a lien upon the paper.[1]

§ 577. **Indorsement "For Deposit."** — When a bank receives from a customer a check on another bank for the special purpose of collection, the title does not pass by the special indorsement for that purpose, nor does the receiving bank owe the amount until the check is collected. But where the customer has a deposit account with the bankers, on which he is accustomed to deposit checks payable to himself, which are entered on his pass-book, and to draw against such deposits, an indorsement of the words "For deposit" on a check so deposited "is, in the absence of a different understanding, presumption of more than a mere agency or authority to collect"; it is a request and direction to deposit the sum to the credit of the customer, and gives to the bankers authority not only to collect, but to use the check in such manner as, in their judgment and discretion, having reference to the condition and necessities of their business, may make it most available in their possession, and they may have it certified by the bank on which it is drawn.[1]

§ 578. When a note is received for collection and credited, the transaction does not preclude the bank from cancelling the credit if the note is dishonored.[1]

[2] National Citizens' Bank *v.* Howard, 3 How. Pr. N. S. 512.

[1] § 576. Perry on Trusts, §§ 161, 243; Michigan State Bank *v.* Gardiner, 15 Gray, 362; Ullman *v.* Barnard, 7 Gray, 554; Story's Equity, § 1265; Patton *v.* Beecher, 62 Ala. 579; Tankersly *v.* Graham, 8 Ala. 247; Newlin *v.* McAfee, 72 Ala. 357; Powell *v.* Jones, 72 Ala. 392; Ellis *v.* Amason, 2 Dev. Eq. 273; Legard *v.* Hodges, 1 Vesey, 477.

[1] § 577. National Commercial Bank *v.* Miller, 77 Ala. 168.

[1] § 578. Trinidad National Bank *v.* Denver National Bank, 4 Dill. 290.

§ 579. When a sale of goods is made, and the parties intend to pass title for cash, and the price is entered as a credit in the pass-book of the seller and on the bank-books of the buyer, such entry is equivalent to payment and subsequent deposit.[1]

§ 580. It is said in a note to Section 228 of Story on Agency, that "if the bills were entered as cash, with the knowledge of the customer, and he drew or was entitled to draw upon the banker, as having that credit in cash, he would thereby be precluded from recurring to the bills specifically. Where the owner of a bill sends it to his correspondent to be collected, with directions to place it to his credit, and at the same time draws at sight against the fund, the title to the bill passes, so that the proceeds cannot be followed into the hands of third persons receiving them in good faith."

§ 581. **Massachusetts.** — "If a check made in this Commonwealth and payable to a resident of another State is deposited by him in a bank there, where he has a general account, under an agreement that all checks drawn on banks in other places shall be passed to his credit on the day of deposit, but, if they are returned unpaid, they shall be charged to his account, and by the law of that State the bank is not his agent in collecting the check, but becomes the owner of it, with the right of charging it back to his account if it is not paid by the bank on which it is drawn, the receiver of the bank, which suspends business on the day of such deposit, may maintain an action for the amount of the check against the maker, who cannot avail himself, in defence, of the fact that, upon such suspension, the payee of the check stopped payment of the same."[1]

§ 582. **New Jersey.** — "A check indorsed in blank by the payee, and placed to his credit in the bank, becomes the bank's legal property, and can be transferred to a *bona fide* creditor."[1] In this case two checks were deposited in the C. Bank, and by it sent to the First National with nothing to show that they were not really and fully the property of the

[1] § 579. Flanders *v.* Maynard, 58 Ga. 56 (1877).

[1] § 581. Brooks *v.* Bigelow, 142 Mass. 6 (1886).

[1] § 582. Hoffman *v.* First National Bank of Jersey City, 46 N. J. Law, 604 (1884).

C. The National applied the checks upon the existing indebtedness of the C. to it. On failure of the C. it was held that the National was a holder for value, and the depositor, not having indorsed "for collection," as he could so easily have done, must bear the consequences of his own carelessness.

§ 583. **When Title to Paper deposited does not pass.** — If a bank does not wish to assume the relation of debtor as to paper deposited, it can easily indicate such intent by crediting it as paper, and not as cash.[1]

(*a*) So if the depositor wishes to retain the ownership he may do so by indorsing "for collection."[2]

(*b*) When there is no usage or course of dealing between the parties to decide the matter, and a check is received without instructions, the bank may elect to receive it for collection or as cash, and the depositor is the owner until the bank makes its election by crediting as cash.[3]

(*c*) Where the customer deposits in the bank commercial paper for collection, at the same time indorsing it over to the bank, the parties understanding that it is only intended by the indorsement to put the paper in such shape that the bank can collect upon it, the title in the paper does not thereby pass to the bank; nor does the bank owe the amount to the customer until such time as the collection is actually consummated. Neither is this strict right of the bank curtailed or altered simply because a practice has been allowed to prevail, by which it has allowed the depositor to draw against deposits of paper for collection before the collection has been actually made. This is a mere gratuitous privilege allowed by the bank, which does not grow into a binding legal usage. Thus it is very common for depositors to deposit checks with their banks, and to draw against them on the same day checks of their own, which may be presented for payment before the bank has had an opportunity to

N. Y. Effect of indorsing paper to the bank.

[1] § 583. Thompson *v.* Giles, 2 Barn. & Cr. 422; Rowton's Case, 1 Rose, 15; and Sargeant's Case, 1 Rose, 153.

[2] Sweeny *v.* Easter, 1 Wall. 166; Hoffman *v.* First National Bank, 46 N. J. L. 604; Cecil Bank *v.* Farmers' Bank, 22 Md. 148.

[3] Scott *v.* Ocean Bank, 23 N. Y. 289.

collect upon the deposited checks. In such cases banks are frequently wont to honor such checks of their customers upon the confidence that the deposited checks will be duly paid. But this habit of the banks is a pure favor, and, if there be no distinct understanding to change the natural effect of such dealing its long continuance gives no real right whatsoever to the depositor to demand its continuance or its practice in any individual case wherein the bank may, for any arbitrary reason, see fit to withhold that favor.[3]

(*d*) In England, a decision, given by Lord Ellenborough,[4] went much further even than this. Bills not yet due were sent to a country banker to collect; according to the custom of country bankers, these were actually entered in the banker's own books to the depositor's credit, with the proper discount, and he was thereafter entitled to draw against this credit before the actual collection. Upon the subsequent failure of the banker, before the collection, it was held that the title in the bills had not passed to him, and that the depositor should recover them specifically, or their amount if the bankrupt's assignees had already made the collection.

England. Bills not due credited.

(*e*) But Lord Eldon held that a depositor could not recover specifically bills entered as cash, to his knowledge, with the privilege of drawing against them.[5]

§ 584. **In Alabama,**[1] it is held that, in absence of any agreement to the contrary, "when a check is deposited it is taken generally for collection by the bank as the agent of the depositor, and the bank does not owe the amount until its collection is accomplished. It may be, that, if it is passed to the credit of the depositor and mingled with the general funds of the bank, it is *prima facie* a payment on deposit; *but the bank may permit, as a matter of favor and convenience, checks to be drawn against it before payment, the depositor in the event of nonpayment being re-*

Deposit of check not payment.

[4] Giles *v.* Perkins, 9 East, 12.

[5] Ex parte Sargeant, 1 Rose, 153; Ex parte Thompson, 1 Mont. & MacA. 102.

[1] § 584. National Commercial Bank *v.* Miller, 77 Ala. 173.

sponsible for the sums drawn, — not by reason of his indorsement, the check not having ceased to be his property, but for money paid."

§ 585. **In Louisiana,**[1] in one of the lower courts, a similar decision is found: "Checks, like drafts, bills, or notes, so deposited with a bank, are placed for collection, and not sold, exchanged, or otherwise made the subject of a contract calculated to transfer title. It is hard to imagine any advantage which could exist, calculated to induce a bank to assume ownership and responsibility for such paper. *The fact that, owing to the short course such paper has to run, these institutions usually permit their customers to draw against the amount of checks deposited does not of itself alter the relations between the parties. The credit is only conditional, and may be cancelled, and the check returned*, should the latter be dishonored. The depositor remains owner of the paper, and the bank merely agent."

§ 586. Checks deposited and credited as cash do not become the property of the bank, so that it takes the risk upon itself, even though the depositor has been allowed to check against the deposit before the paper is collected,[1] and the depositor can recover the check or other paper, if it is still in the possession of the depositor.

When a customer deposits a check *on another bank*, without any special contract, the property remains in him, and the bank is his agent until it has notice that the correspondent bank has received the money and credited it. If the deposit is made and credited to cover an overdraft, or is drawn upon, the bank can hold the paper until the account is squared, but the property is in the customer. It is said that indorsement of the check to the bank, and credit on the books of the bank and on the pass-book, are evidence of a contract by which the bank shall become owner of the paper; but (1) banks always claim and *exercise the right of charging to the depositor all such checks returned unpaid, which is not consistent with the theory of an understanding that title passes absolutely.*

[1] § 585. Louisiana Ice Co. *v.* State National Bank, 1 McGloin, 185.

[1] § 586. Balbach *v.* Frelinghuysen, 15 Fed. Rep. 675.

(2) The practice of allowing depositors to check against such paper is reckoned by the ablest text-writers as a mere gratuitous privilege[1] (referring to Morse, 2d ed., p. 27). This decision is approved in New Jersey.[2]

§ 587. If, however, the check is not *still in the possession of the depositary bank*, but has been forwarded by it and credited by its correspondent, the depositor is not entitled to preference.[1] In Illinois, the A. Bank received from a depositor a check on the B. Bank for collection, and credited its depositor with the amount at the time of receiving the check. The check was returned from the B. dishonored. *Held*, that the A. might cancel the credit given.[2]

This matter of crediting paper does not seem capable of settlement merely by showing a usage or course of dealing to credit as cash, and allow the depositor to draw at once. Such usage is not a usage to take the risks on the paper, and is consistent with the subsequent cancelling of the credit on dishonor of the paper; to establish by usage the claim that the bank must bear the risk, it must be shown that in a long series of instances in which the question arose the bank has borne the loss by dishonor of paper credited as cash. Moreover, the existing customs in this department of banking seem more like a series of courtesies than such stuff as usages are made of. If the bank is wont at once, on receiving such a check of a third party drawn on another bank, to give the customer credit for the amount, and to allow him instantly to draw against his credit or balance thereby created, then it is possible that this habit may exhibit the traits of a legal usage, and may therefore suffice to create an implied contract between the parties, which will bind the bank to cash the customer's checks drawn against a deposit of such other checks at any time before they have been presented for collection. But though there is no legal objection to the establishment of such a usage as this, there are strong practical obstacles. A bank may be willing

A series of courtesies bases no right to more.

[2] Hoffman *v.* First National Bank, 46 N. J. Law, 607.

[1] § 587. Terhune *v.* Bank of Bergen Co., 34 N. J. Eq. 367.

[2] Decatur National Bank *v.* Murphy, 9 Ill. App. 112 (1881)

in ninety-nine cases out of a hundred to risk the goodness of the check deposited. But its mere willingness in each one of these cases to waive the full exercise of its strict right ought not alone, *per se*, to operate to deprive it of the right in a case wherein it should desire to exercise it. A habit to do a favor to a customer when it seems safe, is not a legal usage creating an obligation to do a like act when it seems unsafe. Strictly the custom, whether a legal usage or a mere habit, is not always and unconditionally to regard deposited checks as money before they are actually collected, but to do so at the bank's discretion. That the discretion happens to operate favorably for the customer in any number of consecutive cases, or for any length of time, ought to afford no cause for expecting or insisting that it shall continue to operate so in any other especial case. Whence it follows, that something in the nature of a tacit understanding, operating to give the color of agreement to the naked habit, must be shown in order to establish the legal usage; which, however, when established, will be intrinsically valid.

(*a*) When the depositor of paper for collection knows of the failing condition of the drawee, and does not inform the depositary of the fact, the latter is not bound by a crediting of the paper.[3]

§ 589. **Insolvency of Depositary as a Ground for Recovery of Deposit.** — A depositor cannot recover a deposit in preference to the general creditors, on the ground that it was received while the bank was insolvent, if the bank was ignorant of its condition.[1] And even though knowing its insolvency, there is no reason to require the officers to disclose the state of affairs to the depositor; they may have reasonable hopes of recovery,[2] and a deposit actually received and mingled with the bank's funds passes title,[3] and the depositor takes only as a general creditor, unless of course the deposit was paper that, under

[3] Freeholders of Middlesex *v.* State Bank, 32 N. J. Eq. 467 (1880).

[1] § 589. Metropolitan Bank *v.* Loyd, 25 Hun, 101; In re Bank of Madison, 5 Biss. 515.

[2] St. Louis *v.* Johnson, 27 Fed. Rep. 543.

[3] Illinois Trust & Savings Bank Case, 21 Blatchf. 275.

the law governing the parties, did not pass to the bank, insolvent or not,[4] or unless the deposit is received under circumstances amounting to a fraud upon the depositor; that is always sufficient to open the door to rescission of a contract, and the depositor can retain against any but a *bona fide* holder.[5] If the deposit has been kept separate, and never actually and fully received as a deposit, the depositor may claim it, though, so far as he knew, it had been taken just as usual. These points will now be more fully examined.

(*a*) When money is paid in by a customer after banking hours, and is put in a place by itself, and not entered in the regular books of the bank, and the bank fails and does not open on the next day, the necessity of failing having been already agreed upon by all the partners, the customer may reclaim his deposit, and hold it as against the assignee of the bankrupt.[6] Though in another case, wherein it was shown that the bankers were in the habit of receiving and the customer was in the habit of making deposits after banking hours, and that such deposits were always regarded and treated by both parties as if regularly made during banking hours, and the bankers had not determined upon the necessity of failing when the deposit was made, a contrary decision was reached.[7] An insolvent bank contemplating suspension acquires no title to a check deposited by one to whom its condition is unknown.[8]

(*b*) A national bank[9] known to its officers to be insolvent received a draft for *collection and remittance;* it obtained the money and mingled it with its own funds before any proceedings were instituted for putting it into liquidation. The court held that it was fraudulent in the bank thus to mingle the proceeds. but having done so, and it being impossible for

[4] Balbach *v.* Frelinghuysen, 15 Fed Rep. 675.

[5] Craigie *v.* Hadley, 99 N. Y. 131.

[6] Threlfal *v.* Giles, cited 2 M. & Rob. 492; Sadler *v.* Belcher, id. 489.

[7] Ex parte Clutton, 1 Fonb. 167.

[8] Fisse *v.* Dietrick, 3 Mo. App. 584 (Appendix, 1877).

[9] Illinois Trust & Savings Bank of Chicago Case, 21 Blatchf. 275.

the plaintiff to identify his money, he could not be preferred to the other creditors of the bank.

A banker who hoped to recover from his insolvency received a deposit from D., who was ignorant of the condition of the bank, marked it with D.'s name, and kept it separate, with intent to return it to D. in case he was compelled to assign for the benefit of his creditors. It was entered in the depositor's book and in a memorandum cash-book, but in no other. The banker did assign, and, giving the said deposit to the assignee, requested him to give it to D., which was held proper by the court, and it was done.[10] But where money has once been actually and fully received on deposit, the bank cannot secure a favorite depositor from loss by marking a package of money with his name before assignment.[11]

§ 590. **Money not belonging to the Depositor.** — When an agent or trustee deposits money of his principal or *cestui*, in his own name, in a bank to which he is indebted, and the bank in ignorance of the true ownership applies the money upon the debt, the owner can recover such money if it can be identified.[1] The Michigan case was error for instructions contrary to the principle that a *cestui* can follow the trust property so long as he can identify it.

(*a*) The C. Bank's teller, T., was a defaulter, and to make his cash full for a count he got a friend, W., to draw a check on C. for $25,000. T. marked it good, and the D. Bank gave W. the cash, which was taken to the C. Bank and put in the form of a package with the rest of the money to be counted, T. intending to return the money after the count and redeem the check; but some suspicion being aroused, he committed suicide, and the money was thus left in possession of the C. Bank. Both banks claimed it, and the court said that the C. Bank could not hold the bills as negotiable securities transferred to it for a good consideration in the usual course of business. Clearly the transaction was not in the usual

[10] Chaffee *v.* Fort, 2 Lans. 81. See Atkin *v.* Barswick, 1 Strange, 165.

[11] Coots *v.* McConnell, 39 Mich. 742 (1878).

[1] § 590. Burtnett *v.* First National Bank, 38 Mich. 630; Cook *v.* Tullis, 18 Wall. 332.

course of business, and there was not even any intent to transfer the money to the C. Bank. The money could be identified, and in equity and good conscience it belonged to the D. Bank.[2]

(*b*) In the Van Allen case,[3] P. gave A. certain bonds to sell and deposit the proceeds in P.'s name. A. sold the bonds, substituted other money for what he received from the sale, and deposited the substitute with more in his own name, yet P. recovered from the bank *which still owed the amount.* The judge said, that if A. had spent the money, so that it was dissipated and could not be traced at all, the *cestui* could not have followed it; but here it was clear from the evidence that A. made a substitution. "If my agent collects $100 rent for me, puts it in one pocket, takes from another pocket other $100, deposits it, and notifies me, are my rights gone by the mere change of money? I think not."

If the trust money or its substitute can be traced into the bank, the owner can claim it, if it is still there. It has been transformed into the shape of a debt due the trustee, and is practically in the same position as substituted property actually in the hands of the trustee.

(*c*) In an English case[4] the Master of the Rolls said that the real owner could not recover, because the money in bank had no "ear-mark," could not be identified. But on appeal, Chancery said that the *debt* was the property, and if it could be identified as a substitute of the original, then so long as it remained due it could be claimed by the *cestui.*

And in Hallett's case the court said that if money held by a person in a fiduciary capacity, although not as a trustee, has been paid by him to his account at his bankers, the person for whom he held the money may follow it, and has a charge on the *balance* in the banker's hands; and the rule in Clayton's case does not apply, but the trustee or agent is deemed to draw his own money first.[5]

[2] Atlantic Bank *v.* Merchants' Bank, 10 Gray, 518.
[3] Van Allen *v.* American National Bank, 52 N. Y. 1.
[4] Pennell *v.* Deffell, 4 De Gex, M. & G. 372.
[5] Knatchbull *v.* Hallett, 13 Ch. D. 696.

(*d*) And in New York, it has been held that trust money deposited with other moneys belonging to the trustee and to third persons may still be claimed, and that its identity is not so far destroyed as to make the *cestui* only one of the general creditors in case of the trustee's insolvency, and the rule in Clayton's case does not apply.[6] The general rule is, that a *cestui* can follow the trust property as far as it can be traced,[7] but not when mingled with other property, so as to be undistinguishable.[8]

(*e*) If a deposit of trust property exists in such shape that the trustee or his representative can claim it, i. e. it is in the name of the trustee himself, and unincumbered as against him, the *cestui* can elect to claim the deposit as his own, or pursue his remedy against the trustee.[9] This seems to us the correct principle, that if the bank has a lien on funds deposited in the name of A., or has taken negotiable paper as security, or in payment of a debt, or in any way has a claim upon the deposit as against the depositor, and has no reason to suppose he is not the true owner at the time of deposit, the bank will be protected, and the true owner can claim only subject to the demand of the bank; and further, that where a trust deposit is actually mingled with other funds, so that the original property cannot be identified, the *cestui* has no better equity than the other creditors of the trustee in case of his failure.

§ 591. **When a Correspondent Bank can hold Paper sent to it for Collection, or the Proceeds of it, against the real Owner.** — When the last bank has successfully effected the collection, it is directly liable to the owner to pay the money over to him only until such time as it has actually remitted the amount to its predecessor.[1] But some nice questions have arisen

[6] Rabel *v.* Griffin, 12 Daly, 241.

[7] United States *v.* State Bank, 96 U. S 30.

[8] Case *v.* Beauregard, 1 Woods, 126.

[9] School Dist. *v.* First National Bank, 102 Mass. 174; Bartlett *v.* Hamilton, 46 Me. 435; Utica Ins. Co. *v.* Lynch, 11 Paige, 520; McAllister *v.* Commonwealth, 30 Pa. 536; Walter *v.* Dolan, 26 Am. Law Reg. N. S. 25 (Ind.).

[1] § 591. Union Bank *v.* Johnson, 9 Gill & J. 297.

where such predecessor, intervening between the real owner of the paper and the bank actually receiving the money, becomes insolvent before the receiving bank has actually paid over the amount to this predecessor. The general rule of law is, that if a person employs an agent to collect money under such circumstances that the agent naturally employs a sub-agent to accomplish the actual collection, then the principal will be entitled to sue the sub-agent, and collect the money directly from him without regard to the relationship or condition of accounts existing between such agent and sub-agent, and although the sub-agent had no knowledge that his employer was an agent, and not a principal. But if the owner has delivered the paper to the agent with no *indicia* whatsoever to show that such agent is not the owner, and the sub-agent receives it from the agent supposing him to be the owner, and gives him credit upon the strength thereof, then the principal cannot recover from the sub-agent.[2] New York, as we shall see, makes one exception to this rule, resulting from its doctrine that one who takes paper merely as collateral for a pre-existent debt, not parting actually with value nor extending credit on the faith of the particular note or bill, is not a holder for value. The same doctrine is held in Wisconsin Tennessee, and Pennsylvania.

§ 592. The leading case illustrative of this principle is that of the Bank of the Metropolis *v.* New England Bank. The latter gave to the Bank of the Commonwealth for collection a piece of negotiable paper indorsed generally, so that, for all that appeared upon it, the Bank of the Commonwealth might be the sole and real owner. The Bank of the Commonwealth forwarded it to its correspondent, the Bank of the Metropolis, with which it had a running account. That bank collected it, and gave the Bank of the Commonwealth credit for it upon the running account. The Bank of the Commonwealth failed, being indebted to the Bank of the Metropolis, and soon after-

[2] Wilson *v.* Smith, 3 How. (U. S.) 763; Bank of the Metropolis *v.* New England Bank, 1 id. 234; s. c. 6 id. 212; Miller *v.* Farmers & Mechanics' Bank, 30 Md. 392; and see Cecil Bank *v.* Farmers' Bank, 22 Md. 148; Sweeny *v.* Easter, 1 Wall. 166.

ward the Bank of the Metropolis was notified of the true ownership of this piece of paper; the latter refused, however, to account to the New England Bank, which accordingly brought suit. The case is first reported in 1 How. U. S. 234; but at a second trial at *nisi prius* in the lower court the rulings of the Supreme Court appeared to have been so misunderstood that that court reiterated them with much clearness and succinctness in the following shape: —

1. If, upon the whole evidence before them, the jury should find that the Bank of the Metropolis, at the time of the mutual dealings between them, had notice that the Commonwealth Bank had no interest in the bills and notes in question, and that it transmitted them for collection merely as an agent, then the Bank of the Metropolis was not entitled to retain the money as against the New England Bank for the general balance of the account with the Commonwealth Bank.

2. And if the Bank of the Metropolis had not notice that the Commonwealth Bank was merely an agent, but regarded and treated it as the owner of the paper transmitted, yet the Bank of the Metropolis is not entitled to retain against the real owners, unless credit was given to the Commonwealth Bank, or balances suffered to remain in its hands, to be met by the negotiable paper transmitted, or expected to be transmitted, in the usual course of the dealings between the two banks.

3. But if the jury find that, in the dealings mentioned in the testimony, the Bank of the Metropolis regarded and treated the Commonwealth Bank as the owner of the negotiable paper which it transmitted for collection, and had no notice to the contrary, and, upon the credit of such remittances made or anticipated in the usual course of dealing between them, balances were from time to time suffered to remain in the hands of the Commonwealth Bank, to be met by the proceeds of such negotiable paper, then the plaintiff in error (the Bank of the Metropolis) is entitled to retain against the defendant in error (the New England Bank) for the balance of account due from the Commonwealth Bank.

Chief Justice Taney, in the first opinion in Bank of the Metropolis *v.* New England Bank, expressly denied that the

former was put upon its inquiry as to the true ownership of the paper, the indorsement by the true owner being general, and not "for collection." The cited cases also establish that the collecting bank, the sub-agent, may retain the money if, without making an actual payment, it has merely given credit to the agent, or suffered balances to its own credit to remain undrawn with the agent, upon the strength of these receipts. But unless it has made some payment, or suffered a balance to remain undrawn, or otherwise substantially relied on the agent's ownership so that it would be unjustly prejudiced by the denial of that ownership, then it cannot retain the money. The true owner, by indorsing "for collection," could save all question;[1] but if he chooses to neglect this precaution, to indorse generally, and thereby to permit his agent to appear as the owner, then if a sub-agent or any other person be misled and a loss occurs, it is proper that the owner whose carelessness has given opportunity for the sub-agent to be deceived should, as between those two, bear the loss.

Where a negotiable instrument,[2] indorsed and delivered in blank to a bank, though in fact only for collection, is sent by it to another bank for "collection and credit" before maturity, and the latter receives it without notice that it does not belong to the former, it may lawfully retain the proceeds of the collection to satisfy a claim for a general balance against the other bank, if that balance has been allowed to arise and remain on the faith of receiving payments from such collections pursuant to a usage between the two banks.

Where the second bank credits the proceeds of the note to the first bank, but extends no credit nor makes any advances on the note, the owner may recover the amount of the note from the second bank.[3] In Milliken *v.* Shapleigh,[4] it was said that, if the banks have mutual and extensive dealings on account current, each has a lien on paper sent by the other for collection; but in the absence of "mutual arrangement or previous course

[1] § 592. Cecil Bank *v.* Farmers' Bank, 22 Md. 148.
[2] Vickrey *v.* State Savings Assoc., 21 Fed. Rep. 773 (1884).
[3] Bury *v.* Woods, 17 Mo. App. 245 (1885).
[4] 36 Mo. 599.

of dealing between the parties, whereby it is expressly or impliedly understood that such remittances of paper are to go to the credit of the previous account, when received, and no advance is made nor any credit given on the basis of the particular bill, and one bank merely passes the proceeds of paper transmitted for collection to the credit of the other on a subsisting indebtedness which it happens to have at the time" against the other, "there is no such lien, and no right to apply the money collected in that manner; but the real owner may maintain an action to recover the amount."

§ 593. **The words "For Collection,"** appended to an indorsement, limit the effect which the indorsement would have without them, and warn subsequent takers that the purpose of the indorsement, though in blank, is not to transfer the ownership of the note, or its proceeds. Such an indorsement is not intended to give currency or circulation to the paper, but has an effect precisely the reverse, prevents further circulation, and limits the authority of the holder to the act of collection for the benefit of the indorser.[1] The indorsement for collection, in the cited case, was not made by the owner, but by his agent in transmitting to the sub-agent. But the opinion makes it perfectly clear that, had the owner himself so indorsed, he would have been protected. So also it has been elsewhere said by the same court, that an indorsement "for collection means simply to rebut the inference from the indorsement that the agent is the owner of the draft. It indicates an agency."[2] The

[1] § 593. Sweeny *v.* Easter, 1 Wall. 166; White *v.* National Bank, 102 U. S. 658; Bank of Metropolis *v.* First National Bank, 22 Blatchf. 58; Cecil Bank *v.* Farmers' Bank, 22 Md. 148; First National Bank *v.* Reno County Bank, 1 McCrary, 491 (1880); Ex parte Pease, 19 Vesey, 25; 1 Dan. Neg. Sec., § 698; Blaine *v.* Bourne, 11 R. I. 119; Trentel *v.* Barandon, 8 Taunt. 100; Wilson *v.* Holmes, 5 Mass. 543; Hook *v.* Pratt, 78 N. Y. 371; Atkins *v.* Cobb, 56 Ga. 86; Edie *v.* East India Co., 2 Burr. 1216, 1227; Brown *v.* Jackson, 1 Wash. Cir. Ct. 512; Tucker Manuf. Co. *v.* Fairbanks, 98 Mass. 101; Mechanics' Bank *v.* Valley Packing Co., 4 Mo. App. 200; s. c. 70 Mo. Rep. 643; First National Bank *v.* First National Bank, 76 Ind. 561; Hoffman *v.* First National Bank of Jersey City, 46 N. J. Law, 604 (1884).

[2] National Bank of Commerce *v.* Merchants' National Bank, 91 U. S. (1 Otto,) 92.

indorsement, in the former case, was in fact made by the agent in transmitting to the sub-agent. The suit was between the owner and the sub-agent; the court held that it was error to permit the jury to determine the case, which was special in its circumstances, upon the custom of bankers in respect of such paper generally.[3]

In Georgia the F. Bank indorsed to the C. Bank "for collection on account of F. Bank"; the C. indorsed to D. "for collection on account of the C. Bank." D. collected the money, and, on failure of C. to pay F. on demand, the latter could maintain suit against D. for money had and received, since no title had passed to C.[4]

The M. Bank discounted certain notes for L., crediting him with the amount, and afterward paying it. The M. before maturity sent the notes to the B. Bank (in favor of which L. had originally indorsed the notes) for collection, indorsing them, "Pay Bank of B. or order for collection, account of M. Bank." L., who ran the B. Bank, received the notes, and transferred them before maturity to H. in payment of a debt. It was held that the indorsements were notice to H. of the title of M.[5]

§ 594. **In Wyman's Case,**[1] the plaintiff, W., drew on D. a draft payable to the order of C., a banker, and delivered it to C. to collect and credit the proceeds to the plaintiff. C. transferred it to the defendant, indorsed, "Pay to the order of the Colorado Bank for account of C.," with instructions to collect and credit C. This was done, and, C. failing, W. sued the Colorado Bank for the proceeds of the draft. But he did not recover, for the court said: 1. One who acquires negotiable paper *bona fide* for value from one capable of transferring it is unaffected by prior equities unless he had notice of them. 2. The indorsement of C. gave the Colorado Bank the title, and as receiving paper as security for pre-existing debt is a sufficient consideration to make the bank a holder

[3] Sweeny *v.* Easter, 1 Wall. 166.

[4] Central R. R. Banking Co. *v.* First National Bank of Lynchburg, 73 Ga. 383 (1884); citing White *v.* Miners' National Bank, 102 U. S. 658.

[5] Merchants' National Bank *v.* Hanson, 33 Minn. 40 (1884).

[1] § 594. Wyman *v.* Colorado National Bank, 5 Col. 30.

for value, and as C. owed the defendant a balance, its title is good. 3. By the law merchant a bank has a lien on all securities deposited by a customer for its general balance, unless there is an express or implied contract inconsistent with such lien. 4. It is elementary law that where one of two innocent parties must suffer by the act of a third, he who has enabled that third person to do the act must bear the loss; and in this case W. could have saved all trouble by indorsing for collection.

When advances are made on a note received for collection, the bank is the owner. The remitting bank is the agent of the holder, and the latter must bear any loss arising from his own negligence or the omissions or fault of his agent.[2]

§ 595. **Michigan.** — A firm had been in the habit of indorsing in blank such drafts or checks as were drawn to its order, and depositing them in a local bank as so much money subject to be drawn on. One of the firm left at the bank without any instructions a bank check so indorsed, and the bank forwarded it for collection to the defendant bank, directing it to send the local bank $2,000 currency, which was done; $3,000 more was sent up to the 3d instant, which remittances would not have been made except on faith of the paper. It was the regular course of business between the banks to make such remittances on such security. On the 5th, the local bank failed, and the depositor brought trover against the defendant bank for the draft. The court decided in favor of the defendant.[1]

§ 596. Where a draft is deposited in a bank without instructions that it shall be treated as a separate fund, and is forwarded by the bank to its correspondent for collection and deposit to its credit, and the fund in the correspondent bank is continually changing by reason of drafts and deposits so that no specific moneys can be identified, the original depositor can, on failure of the first bank, recover no more than his *pro rata* share, like any other creditor.[1]

§ 597. **Massachusetts.** — A simple case was one in which the owner of a negotiable promissory note, indorsed in blank by

[2] Moore *v.* Meyer, 57 Ala. 20.

[1] § 595. Cody *v.* City National Bank, 55 Mich. 379.

[1] § 596. Edson *v.* Angell, 58 Mich. 336 (1885).

the payee, gave it to an attorney at law for collection. The attorney deposited it for collection in a bank with which he had dealings, making no statement to indicate that it was for account of any other person than himself. The bank collected the note, and credited the amount against indebtedness then owing to itself from the attorney. A year afterward, the owner of the note, then first becoming aware of its payment, sought to compel the bank to pay him the amount; the attorney meanwhile had become bankrupt, and a settlement of his accounts with the bank had been made, in which he had received credit for the amount of the note. The court held that the owner of the note could not recover from the bank.[1]

§ 598. **England.** — Bank notes and bills of exchange were paid in to a country banking firm to be remitted to London to meet certain acceptances. The firm sent to its London agent the bills and some bank notes, with a letter directing him to pay a certain sum of money, and giving notice of the acceptances as payable at the agent bank. The firm stopped payment, owing a large balance to the London bank. It was held, that, as between J. and the London bank, there was no appropriation of the bills and notes to meet the acceptances, and that the London bank could retain them without meeting the acceptances.[1]

§ 599. **New York** has peculiar views on this subject of title. It admits that any advance actually made on the faith of paper without notice, makes the bank a holder for value, but holds that taking paper as collateral for a pre-existing debt does not constitute a *bona fide* holding, that a bank cannot hold paper not belonging to its debtor merely because of a general balance, and that a bank is put on its inquiry to find out if a general indorsement is only for collection or is a transfer of title. The last ruling is clearly indefensible, as breaking down security in business and injuring foresight, and the doctrine as to pre-existing debt is little better. (See Analysis at head of the chapter.) The cases in New York are not reconcilable with each other.

[1] § 597. Wood *v.* Boylston National Bank, 129 Mass. 358.

[1] § 598. Johnson *v.* Robarts, L. R. 10 Ch. App. 505.

In McBride *v.* Farmers' Bank,[1] the court declared that the doctrine of the Bank of the Metropolis *v.* New England Bank had never been adopted in New York, but that the opposite had been frequently and consistently maintained, and it preferred to follow the precedents of the State adjudications; saying that a course of dealing and habit of accounting between the banks could not be allowed to affect the rights of the holder and owner of the paper, who has never parted with his property in it.

In another case, the plaintiff, being the owner of a note, indorsed it in blank, and deposited it in the M. Bank for collection. By this bank it was forwarded to the defendant bank, with directions to collect and credit the M. Bank with the proceeds. This was done by the defendant. At the time of the forwarding, the M. Bank was indebted to the defendant bank, and, after receipt of the note, the defendant paid drafts drawn upon it by the M. Bank. Defendant had no knowledge of the ownership of the note. Held, that defendant could not set up, against the suit by the real owner, that it held the note or proceeds for value by reason of the indebtedness of the M. Bank already existing at the time of the receipt of the note by the defendant; neither by reason of the fact that defendant had, subsequently to such receipt, paid drafts of the M. Bank, unless these drafts had been actually paid upon the faith of this note.[2]

In Van Amee *v.* Bank of Troy,[3] which was cited and relied upon in McBride *v.* Farmers' Bank, A. indorsed over a note to B. bank, which transmitted to C. bank, which collected. A. was allowed to recover from C. bank, despite the course of accounting between it and B. bank. The court, loath to run counter to the distinguished authority of the Supreme Court

[1] § 599. 26 N. Y. 450; citing as authorities in the State of New York, Coddington *v.* Bay, 20 Johns. 637; Rosa *v.* Brotherson, 10 Wend. 86; Stalker *v.* McDonald, 6 Hill, 93; Youngs *v.* Lee, 2 Kern. 551. Subsequently, McBride *v.* Farmers' Bank was relied upon as authority in Commercial Bank of Clyde *v.* Marine Bank, 3 Keyes, 337; Lindauer *v.* Fourth National Bank, 55 Barb. 75.

[2] West *v.* American Exchange Bank, 44 Barb. 175.

[3] 8 Barb. 312.

of the United States, sought to reconcile its decision with that of Bank of the Metropolis *v.* New England Bank, by saying that in this case C. bank was put upon its inquiry as to the ownership by any other person than B. bank, and that the circumstances precluded the possibility of supposing any agreement that a lien on this paper should exist between the banks. But this theory was quite illusory; the State court might as well have come out boldly, and overruled or disagreed with the national court. It based its notion of C. bank being put upon inquiry wholly upon the fact that A. had indorsed over to B. bank; and a similar indorsement existing in the case before the Supreme Court had not been regarded as putting the third bank upon inquiry, but as passing title for all practical purposes to the second bank. That court say, in substance, that the indorsement, being general, vests such an apparent title in the indorsee bank that the subsequent banks are justified, without inquiry, in treating the paper as if the real and absolute title were in that bank. It is upon this principle that the whole decision turns. But the cases upon the other side hold that indorsement generally, being a common method where only power to collect, and not the outright title, is intended to be conveyed, ought not in fact to be considered as sufficient ground upon which the subsequent banks can assume that the indorsee bank is the real or controlling owner of the paper, but ought rather to put such subsequent banks upon their inquiry, to learn whether the indorsee bank is simply indorsee for collection, or really for ownership.[4] According to this view indorsement cannot safely be taken as conclusive of anything concerning the title or the power to pledge.

A bank's merely discounting a note and crediting the amount upon its books does not constitute it a holder for value.[5]

The City Bank of Rochester, to which a draft for $6,500 had been sent by the holder for collection, caused it to be col-

[4] McBride *v.* Farmers' Bank, and Van Amee *v.* Bank of Troy, *supra;* Bank of Washington *v.* Triplett, 1 Pet. 25.

[5] Central National Bank of the City of New York *v.* Valentine, 18 Hun, 417.

lected by the Auburn Bank, where it was payable, and the proceeds to be sent to the American Exchange Bank to pay a debt due the latter from the City Bank, the American Exchange Bank taking it in good faith. Held, that the holder could not recover the amount from the last-named bank.[6]

It was again decided, in Stark's case,[7] that a bank could not hold paper for a general balance when the paper does not belong to its debtor. Upon the trial of this action, it appeared that a note and draft were indorsed in blank by the owners, firm of Mohler and Sons, and delivered with letters of instruction to the State Bank of West Virginia for collection. By this bank they were sent to the defendant bank, with a letter of advice and an indorsement, each to the effect that they were sent for collection. After they had been received by the defendant, and before either of them had been collected, the State Bank of West Virginia became insolvent and failed, and the firm of Mohler and Sons assigned note and draft and their right of action to the plaintiff, who, after a refusal of the defendant to comply with a demand for the note and draft made by him, brought this action for their conversion.

Held, that as no draft or check was drawn upon the defendant by the Virginia bank, and no advance was ever made by the defendant based upon either note or draft, it had no legal right to hold the paper for its security on account of the general balance in its accounts against the Virginia bank. What it was legally bound to do, as the State Bank had failed and discontinued its business, was to return the paper to its owners; and as it failed to do that when a proper demand for it was made, and afterward proceeded to collect the note and draft, it was chargeable with a conversion of those instruments.

[6] Charlotte Iron Works *v.* National Exchange Bank, 34 Hun, 26.

[7] Stark *v.* United States National Bank, 41 Hun, 506; citing Scott *v.* Ocean Bank, 23 N. Y. 289; McBride *v.* Farmers' Bank, 26 id. 450; Dickerson *v.* Wason, 49 id. 439; Jessop *v.* Miller, 1 Keyes, 321; Spraights *v.* Hawley, 39 N. Y. 441; Bank of Rochester *v.* Jones, 4 Comst. 497; Cay County Bank *v.* Daniels, 47 N. Y. 631.

P. gave a bill to D. to collect. D. transmitted to S. By the indorsements D. appeared to be the real owner. S. collected and gave D. credit on general account, D. being indebted to S. at the time. When the bill was paid to S. and credited to D., the latter had failed. No new transaction arose between D. and S. after payment of the bill. The court said, that, if D. had owed S. nothing, P. clearly could recover, and it could see no reason why he should be barred because D. was debtor of S. The evidence shows that S. incurred no new responsibility on the faith of this bill, and *his transactions with D. remained in all respects the same as they would have been if this bill had never been transmitted to him.* But if credit had been extended and balances suffered to remain, or credit given in any way on faith of the paper transmitted or *expected to be received* in the usual course of business, the hazard run by the extension of credit would make S. a holder for value, as truly as if he had made direct advances of money.[8]

§ 600. **The New York View does not commend itself,** either in respect of reason or authority. A pre-existing debt is a sufficient consideration as between the parties for the transfer of collateral security, and constitutes the creditor a holder for value beyond equities.[1]

Taking a negotiable instrument as security for a pre-existing debt without any agreement for delay is sufficient to make the party a *bona fide* holder for value.[2] The holder is natu-

[8] Wilson *v.* Smith, 3 How. 770.

[1] § 600. Des Moines National Bank *v.* Chisholm, 33 N. W. 234 (Iowa, July, 1887).

[2] MacCarty *v.* Roots, 21 How. 432; Railroad Co. *v.* National Bank, 102 U. S. 14, although the transaction was in New York, the court holding that the undertaking of the bank to fix the liability of the parties was sufficient to protect it. It assumed the duties and responsibilities of a holder, and should have the protection of one. Maitland *v.* Citizens' National Bank, 40 Md. 540 (1874); Straughan *v.* Fairchild, 80 Ind. 498 (S. C. Ind.); Atkinson *v.* Brooks. 26 Vt. 569. Paper security as security for pre-existing debt good. See Fisher *v.* Fisher, 98 Mass. 303; Roberts *v.* Hall, 37 Conn. 205; Bank of Republic *v.* Carrington, 5 R. I. 515; Mix *v.* National Bank, 91 Ill. 20; Robinson *v.* Smith, 14 Cal. 94; Boatman's Savings Institute

rally lulled into security and inactivity through faith in the paper, and it is impossible to draw a line between value given at the time and previous consideration, if there is good faith in both cases. If money is paid or service rendered, and a note or check is given upon such consideration, no case doubts that the holder is protected; yet *some interval of time elapses between the consideration and the delivery of the paper.* What difference can it make in the rights of the parties whether this interval be one moment, one month, or one year, other facts being the same?

In Railroad Co. *v.* National Bank, the court said: "Our conclusion is, that the transfer before maturity of negotiable paper as security for an antecedent debt merely, without other circumstances, if the paper be so indorsed that the holder becomes a party to the instrument, although the transfer is without express agreement by the creditor for indulgence, is not an improper use of such paper, and is as much in the usual course of commercial business as its transfer in payment of such debt"; and "bills and notes of this kind, indorsed in blank or payable to bearer, when transferred to an innocent holder, create the same liability as if indorsed at the time of the transfer."

§ 601. **Connecticut.** — In the Stonington case the bill was indorsed from bank to bank, and the court held parol evidence admissible to show that the indorsements were only for collection, and ruled that if the last bank, the defendant, had paid value for the bill, it could hold against the plaintiff; but as it had sustained no loss on account of the transaction, it was not within the spirit of the rule protecting a *bona fide* holder, and there was no reason why the real owner should be deprived of his property merely because of a custom among the banks themselves as to crediting bills on account. Such a custom cannot affect third parties without their consent, express or implied.[1]

v. Holland, 38 Mo. 49; Armour *v.* McMichael, 36 N. J. L. 92; Bank *v.* Chambers, 11 Rich. 657; Gibson *v.* Conner, 3 Ga. 47; Geovanovich *v.* Citizens' Bank, 26 La. An. 15; Greneaux *v.* Wheeler, 6 Tex. 55.

[1] § 601. Lawrence *v.* Stonington Bank, 6 Conn. 521 (1827).

§ 602. **In Pennsylvania**, also, a general balance is not sufficient to constitute the correspondent bank a holder for value.[1] And the sub-agent cannot, on failure of its correspondent, credit the proceeds to it unless it has made advances or given new credits on account of it.[2]

§ 603. **Title to Discounted Paper. — Kansas.** — If a bank discounts a note for a customer and places the amount thereof to his credit upon his general deposit account, the bank does not thereby become a holder or purchaser for value so as to be protected against infirmities in the value of the paper;[1] unless, before receiving notice of such infirmities, it pays out on account of the depositor so much that the balance of his deposit is less than the amount credited to him upon the discount.[2] But it seems that the presumption, by reason of the bank's possession, is that the bank is a purchaser for value, which presumption must be defeated by evidence showing the state of the customer's account.[3]

§ 604. **Title between Third Parties.** — The presumption is that a deposit belongs to the depositor individually, and the addition of a title, such as "S. S., Collector," or "H. R., Co. Treas.," does not of itself overcome the presumption; they are mere *descriptio personæ*. These annexations may be only for designation (or for vanity), but in connection with other facts may be evidence that the deposit is a public one.[1] It is well established that such titles impart no notice that negotiable paper so indorsed is trust property.[2] But where a depositor has two deposits, one in his individual name and one in his name as trustee or treasurer, it would seem that the addition could not be regarded as of no weight.

[1] § 602. First National Bank *v.* Gregg, 79 Pa. St. 384; Jones *v.* Milliken, 41 Pa. St. 251.

[2] Hackett *v.* Reynolds, Lamberton, & Co., 114 Pa. St. 328 (Oct., 1886).

[1] § 603. Mann *v.* Second National Bank of Springfield, 30 Kans. 412.

[2] Fox *v.* Bank of Kansas City, 30 Kans. 441.

[3] Mann *v.* Second National Bank of Springfield, 34 Kans. 746.

[1] 604. Eyerman *v.* Second National Bank, 13 Mo. App. 289; 84 Mo. 408; Swartwout *v.* Mechanics' Bank, 5 Denio, 555.

[2] Powell *v.* Morrison, 35 Mo. 244.

(*a*) If an attorney,[3] or administrator[4] (even though having no other account, and informing the bank of the character of the fund[4]), or any agent or trustee,[5] deposits in his own name the money of his principal or the *cestui*, it is the agent's loss in case the bank fails. The burden is on the party claiming a deposit that stands in the name of another; the law presumes truth and regularity.[6]

Husband and wife.

(*b*) A deposit in the name of husband and wife, by reason of their unity, goes entire to the survivor.[7]

Deposit to order of A. or B.

(*c*) Where money was deposited by A. and by B. in their mutual presence, to be drawn by either or both, it was held that on the death of A. the right to the whole did not pass to B.; but A.'s wife, who had the pass-book, was entitled to receive so much of the existing fund as had been contributed by her husband.[8]

Administrator.

(*d*) Where S. deposits to the credit of "S., Trustee for C. B.," the right of S. to demand and receive the fund as trustee passes to her administrator, and the bank is protected in a payment to him if it has not adverse orders from the *cestui*.[9]

(*e*) A depositor, D., assigned his bank-book to H., and he gave the bank notice. C., a creditor of D.'s, attached the deposit, got judgment, and the bank issued a new book to C.'s lawyer as trustee of the deposit; but it was held that, the assignment and notice being prior to the attachment, H. was the owner of the fund.[10]

§ 605. **Specific Deposit.** — When A. deposits money with directions to pay it on a certain check he has given or will give, the money is A.'s until the bank either pays it or prom-

[3] Robinson *v.* Ward, 2 Car. & P. 59.

[4] Williams *v.* Williams, 55 Wisc. 300; Commonwealth *v.* McAllister, 28 Pa. St. 480.

[5] Norris *v.* Here, 22 La. An. 605; Shaw *v.* Bauman, 34 Ohio St. 25.

[6] Egbert *v.* Payne, 99 Pa. St. 239 (1881).

[7] Platt *v.* Grubb, 48 Hun, 447; Bertles *v.* Nunan, 92 N. Y. 152.

[8] Mulcahey *v.* Emigrant Industrial Savings Bank, 89 N. Y. 435.

[9] Boone *v.* Citizens' Savings Bank, 84 N. Y. 83. See 21 Hun, 235.

[10] Commonwealth *v.* Scituate Savings Bank, 137 Mass. 301.

ises the payee to pay it, unless the deposit was made under an arrangement with the payee.[1]

Money deposited by A., to be paid at a certain time to B., cannot before that time be taken by the creditors of B. upon any legal process.[2] So, in England, it has been held that, where money is paid in to the banker by his customer, for the express and declared purpose that the same should be paid over to a third party, nevertheless such third party can enforce no claim against the fund until the banker shall, by some act upon his own part, have come under an obligation to pay to him.[3] But many times the third party in such cases has been allowed to recover, not on the ground of title, but of contract. See § 499, n. 1.

§ 606. **Bank Balance as "Cash" or "Money," in Bequests.** —A bank balance, although a simple contract debt, is nevertheless practically nearly or quite equivalent to cash in hand; and this characteristic has been recognized by the courts in various decisions. For example, a bequest of the testator's "money," or "money in hand," or "ready money," or other like phrase, has been held to carry his balance at his banker's.[1]

Money in bank was held to pass by the words "all my stock in trade."[2] So under the words "accounts due,"[3] and "all my moneys."[4]

[1] § 605. Mayer *v.* Chattahoochee National Bank, 51 Ga. 325 (1874); Pace *v.* Howard College Trs., 15 Ga. 486 (1854).

[2] Foxton *v.* Kucking, 55 Me. 346.

[3] Malcolm *v.* Scott, 5 Exch. 610.

[1] § 606. Parker *v.* Marchant, 1 Y. & Coll. C. C. 290, affirmed 1 Phil. C. C. 356; In re Powell's Trusts, 1 Johns. 49 (Eng.); 5 Jur. N. S. 331; Manning *v.* Purcell, 1 Sm. & G. 284; Vaisey *v.* Reynolds, 5 Russ. 12; Beck *v.* Gillis, 9 Barb. 35; Mann *v.* Mann, 1 Johns. Ch. 231; s. c. 14 Johns. 9; Fryer *v.* Ranken, 11 Sim. 55; Smith *v.* Butler, 1 Jones & Lat. 692; Stein *v.* Richardson, 37 L. J. Ch. 369; and see Cook *v.* Wagster, 1 Sm. & G. 296; Langdale *v.* Whitfield, 4 K. & J. 426; 27 L. J. Ch. 795.

[2] Stuart *v.* Earl of Bute, 3 Ves. Jr. 212.

[3] Burress *v.* Blair, 61 Mo. 133.

[4] Jenkins *v.* Fowler, 63 N. H. 244.

CHAPTER XXXVII.

TITLE BY GIFT.

§ 607. Analysis. See Gift of Check, § 548.

A. Gift Inter Vivos requires: —

(1) Intent to transfer the title presently from the donor to the donee, or to some one for the donee.

(2) Delivery, or actual transfer of possession or control.

(3) Acceptance, which latter may be presumed. There must be *intent*, manifested in some usual and well understood manner, as by, —

§ 608. (*a*) Delivery of savings bank-book, with words indicative of intent to pass the title to the deposit from the donor at once.

§ 609. (*b*) Deposit in name of donee. See § 615 *c*.

§ 610. (*c*) Declaration that the deposit is in trust for the donee, which passes the equitable title, and may be done either by a transfer to a third person in trust for the donee, or by a simple declaration by the donor, oral or written, that he himself holds *in præsenti* as trustee for the donee.

And some cases hold that such a transaction passes title, even though the *cestui* has no notice, and the donor retains the book; but other cases regard this combination of facts as evidence of intent not to complete the gift. See § 615 *c*.

B. Donatio Causa Mortis requires: —

§ 611. (1) Intent to pass title to donee *at the death* of the donor from an existing illness or peril.

§ 612. (2) Transfer of possession, actual or constructive, to the donee, or to some one for him, during the life of the donor, and what constitutes this delivery is a question on which the decisions are not harmonious. Manual transfer of the bank-book is sufficient.

(3) Death of the donor from said illness or peril.

C. No Gift.

§ 613. If the transfer is without intent to pass title,

§ 614. Or if the intent is only that title shall pass at the death of the donor, (the case not coming within the definition of a *donatio causa mortis*,) for this being a testamentary disposition of property must conform to the Wills Act.

§ 615. Or if there is no delivery.

§ 608. **Gift Inter Vivos by Transfer of the Bank-Book.** — Delivery of a savings bank-book, with entries to the credit of

the donor, to the donee or to some other person for him, with intent to vest the title to the deposits in the donee, passes the equitable title to him.[1] A depositor gave his bank-book and an order for payment to his daughter, and she gave the bank notice. The bank, notwithstanding, paid the fund to the administrator of the depositor. The daughter recovered.[2]

Giving the bank-book to the donee, saying, "Keep this until I call for it, and if I never call for it, it is yours," is a good gift; there is intent, delivery of control, and acceptance.[3] Where the donee is present at the time of deposit, and the bank-book is given into his possession, with intent to transfer the deposit to him, and it is accepted by him, there is a gift.[4] Some cases hold that delivery of the book must be actually and formally made, even when the donee is already in possession of it.[5] But other cases hold that, if the donee is already in possession, any clear declaration of intent, verbal or written, is sufficient to complete the gift.[6] In Penfield *v.* Thayer, just cited, the donor said, "My trunk and what there is in it I give to you; there is enough in it to take care of you for life," — and went away not expecting to return; but did in fact return, and occupied his room in the boarding-house where both donor and donee lived. Soon after, the donor died, and the donee took possession of his trunk, and found in it a bank-book, which she was held to have a right to keep.

When donee is in possession already.

[1] § 608. Hill *v.* Stevenson, 63 Me. 364; Marston *v.* Marston, 21 N. H. 491; Dole *v.* Lincoln, 31 Me. 422; Borneman *v.* Sidlinger, 15 Me. 429; Wells *v.* Tucker, 3 Binn. 366.

[2] Foss *v.* Lowell Five Cents Savings Bank, 111 Mass. 285.

[3] Camp's Appeal, 36 Conn. 88; Brown *v.* Brown, 18 Conn. 410.

[4] Sweeny *v.* Boston Five Cents Savings Bank, 116 Mass. 384.

[5] Shower *v.* Pilch, 4 Ex. 477; French *v.* Raymond, 39 Vt. 623; Cutting *v.* Gilman, 41 N. H. 147.

[6] Ten Brook *v.* Brown, 17 Ind. 410; Stevens *v.* Stevens, 2 Hun, 470; Sutherland *v.* Sutherland, 5 Bush, 591; Wing *v.* Merchant, 57 Me. 383; Roberts *v.* Roberts, 15 W. R. 117; Providence Inst. *v.* Taft, 11 R. I. 502; Waring's Adm'r *v.* Edmonds, 11 Md. 424; Carradine *v.* Carradine, 58 Miss. 286; Winter *v.* Winter, 101 Eng. C. L. 997; Penfield *v.* Thayer, 2 E. D. Smith, 305.

§ 609. **Gift by Deposit in Name of Donee.** — A father made a deposit of his wife's money in the name of his daughter. The mother intended a gift, and though the daughter did not know of it until after the father died, and he had pledged the bank-book for his debt, the judge said that *it was to be inferred* that an absolute gift was intended, which had not been revoked, and that *the daughter had accepted it.*[1] So where Adaline Brown deposited money in the name of another (B.) and kept the book, and B. died before Adaline, without ever knowing of the deposit in her name, yet it was held a good gift, and went into B.'s estate.[2]

Acceptance presumed.

It is well established that a gift may be made without delivery of the pass-book.[3] But some cases do not hold, as above, that the acceptance of the donee will be presumed, but say that the gift is not perfect until acceptance, which requires some mutual action of the parties, or act of one assented to by the other. Any act or speech, at any time before the gift is revoked, showing a mutual understanding that the gift is made, is sufficient; but *some* act is necessary.[4] A deposit in the name of the wife of the depositor, against which the wife drew checks thereby signifying her acceptance, is a good and complete gift, and the deposit cannot be applied to satisfy the overdraft of the depositor.[5]

Mass.

Acceptance not presumed.

Checking against deposit is an acceptance.

§ 610. **Gift Inter Vivos by Declaration of Trust.** — D. told her banker to put $2,000 in the joint names of N. and W., and of herself as trustee for N. and W. This being done, the trust was held to be complete, though no notice was given to the donees.[1] In the case of personal property, no form of words is necessary to create a trust; it is sufficient if the owner transfers to a third person

No notice necessary, nor delivery of the bank-book.

[1] § 609. Kimball *v.* Norton, 59 N. H. 1.

[2] Howard *v.* Savings Bank, 40 Vt. 597.

[3] Blasdel *v.* Locke, 52 N. H. 238.

[4] Scott *v.* Berkshire County Savings Bank, 140 Mass. 157; Gerrish *v.* New Bedford Savings Institution, 128 Mass. 159.

[5] People *v.* State Bank, 36 Hun, 607.

[1] § 610. Wheatley *v.* Purr, 1 Keen, 551.

in trust, or declares orally or in writing, that he himself holds *in præsenti* as trustee for another. B. made deposits in trust for two sisters; neither of them knew of the transaction, and B. retained the pass-book till her death; yet it was held a good gift by trust, the court saying that a gift could be made by transferring the property to a trustee for the purposes of the trust, or by declaring that it is held by the donor in trust for those purposes. It is the natural and proper thing for a trustee to retain the book given him as trustee; and a trust, if unequivocally created, cannot be affected by retention of the instrument of trust, especially where the retainer is himself the trustee. It is a question of fact whether he holds the book for himself or as trustee.[2] And where a deposit was credited to "M. D., trustee of William," and M. D. told William's father what was done, but nevertheless drew the deposit herself, William recovered the amount from her administrator.[3]

Some cases hold that, as the rules of a savings bank require production of the book by one who claims the deposit, it is evidence of intent not to perfect the gift if the donor trustee retains the book, and does not communicate the fact of the trust to the donee. If the donee is neither a party nor privy to the transaction, the trust is executory if the trustee retains possession, title, and power of disposing of the property.[4] A

Retaining book and giving no notice is evidence of intent not to complete gift.

[2] Ray *v.* Simmons, 11 R. I. 266; Penfold *v.* Mould, L. R. 4 Eq. 562; Fletcher *v.* Fletcher, 4 Hare, 67; McFadden *v.* Jenkins, 1 Hare, 458; Martin *v.* Funk, 75 N. Y. 134; Ex parte Pye, 18 Ves. Jr. 140; Milroy *v.* Lord, 4 DeG. F. & J. 264; Richardson *v.* Richardson, L. R. 3 Eq. 686; Mabie *v.* Bailey, 95 N. Y. 206; Anderson *v.* Thompson, 38 Hun, 394; Kekewick *v.* Manning, 1 DeG. M. & G. 176; Exton *v.* Scott, 6 Sim. 31; Morgan *v.* Malleson, L. R. 10 Eq. 475, Barker *v.* Fryc, 75 Me. 29; Thorpe *v.* Owen, 5 Beav. 224; Scott *v.* Berkshire County Savings Bank, 140 Mass. 157; Murray *v.* Cannon, 41 Md. 466; Carson's Adm'r *v.* Phelps, 40 Md. 73; Gardner *v.* Merritt, 32 Md. 78; Smith *v.* Lee, 2 Th. & C. 591; Hayden *v.* Hayden, 142 Mass. 448; Ide *v.* Pierce, 134 Mass. 260; Millspaugh *v.* Putnam, 16 Abb. Pr. 380; Souverbye *v.* Arden, 1 Johns. Ch. 240; Bunn *v.* Winthrop, 1 ib. 329; Witzel's Case, 3 Bradf. 386, *cestui* no notice; Blasdel *v.* Locke, 52 N. H. 238, *cestui* had notice.

[3] Minor *v.* Rogers, 40 Conn. 512.

[4] Stone *v.* Bishop, 4 Clif. 593; Armstrong *v.* Temperon, 24 Law T

depositor will not be allowed to violate or evade the law limiting the amount of deposit to one name, by making a trust deposit, and giving no notice to the donee.[5] In such cases, it would seem the quickest way to enforce the law to uphold the trust as valid.

Extraneous evidence is admissible as to the intent of the donor. His declarations and acts, while holding the trust, are competent to show the real character of the transaction. A deposit "in trust" is not conclusive evidence of a trust, if surrounding circumstances repel the presumption that the donor intended to part with the property.[6]

611. Donatio Causa Mortis in General.

1st. A gift *causa mortis* must be made in contemplation of the near approach of death, from present illness or apprehended peril,[1] which must be something more certain than the vague apprehension of a soldier going into war.[2]

2d. The donor must die of that particular sickness or peril;[3] otherwise, if the donor recovers, the gift is revoked,[4] as

N. S. 275; and see Clark *v.* Clark, 108 Mass. 522; Bartlett *v.* Remington, 59 N. H. 364; Ide *v.* Pierce, 134 Mass. 262; Gardner *v.* Merritt, 32 Md. 78; Broderick *v.* Waltham Savings Bank, 109 Mass. 149; Gilpin *v.* Gilpin, 1 My. & K. 520; Brabrook *v.* Boston Five Cents Savings Bank, 104 Mass. 228; Pierce *v.* Boston Five Cents Savings Bank, 129 Mass. 425; Vanderberg *v.* Palmer, 4 Kay & Johns. 204.

[5] See Brabrook *v.* Boston Five Cents Savings Bank, 104 Mass. 228.

[6] Bartlett *v.* Remington, 59 N. H. 364; Ray *v.* Simmons, 11 R. I. 266; Hill *v.* Stevenson, 63 Me. 364; Minor *v.* Rogers, 40 Conn. 512; Gerrish *v.* New Bedford Savings Institution, 128 Mass. 159; Scott *v.* Berkshire County Savings Bank, 140 Mass. 157; Weber *v.* Weber, 9 Daly, 211; Mabie *v.* Bailey, 95 N. Y. 206, 210.

[1] § 611. See on the general requisites, 2 Kent, 444; Kenistons *v.* Sceva, 54 N. H. 37; Grymes *v.* Howe, 49 N. Y. 17; Raymond *v.* Sellick, 10 Conn. 484; Michener *v.* Dale, 23 Pa. St. 59; Edwards *v.* Jones, 1 My. & Cr. 233; Miller *v.* Miller, 3 P. Wms. 356. It is presumed to be in contemplation of death if in last illness.

[2] Irish *v.* Nutting, 47 Barb. 370; Gourley *v.* Linsenbigler, 51 Pa. St. 345; Smith *v.* Dorsey, 38 Ind. 451.

[3] Weston *v.* Hight, 17 Me. 287.

[4] Weston *v.* Hight, 17 Me. 287; Parker *v.* Marston, 27 Me. 196; Stani-

it may be also by the declared will of the donor at any time before his death.[5]

3d. The intent must be that the gift shall take effect only upon the death of the donor[6] (otherwise it may be a gift, but not a *donatio causa mortis*), and if the donee die before the donor, the gift never takes effect.[7]

4th. There must be a delivery by the donor, or by some one at his order,[8] to the donee or to some third person for the donee;[9] and this delivery must be during the life of the donor, though the delivery by the third person to the donee may be after the donor's death.[10] Constructive delivery, as of the key of a trunk in which valuable articles are kept, has been in some cases held sufficient,[11] in others not.[12] Control, or the emblem of it, should pass from the donor.

5th. The donee must accept.[13]

6th. The gift may be coupled with a trust.[14]

7th. It cannot avail against creditors if they would be prejudiced by sustaining it, as where the assets are insufficient to pay them.[15]

land *v.* Willott, 3 Mac. & G. 664. But see Nicholas *v.* Adams, 2 Whart. 17 (Pa.), and Irish *v.* Nutting, 47 Barb. 370.

[5] Merchant *v.* Merchant, 2 Bradf. 432 (N. Y.); Bunn *v.* Markham, 7 Taunt. 224.

[6] Tate *v.* Hilbert, 2 Ves. Jr. 120. If the gift is in contemplation of death, this condition is implied unless circumstances indicate an intent to make an irrevocable gift *inter vivos*. Rhodes *v.* Child, 64 Pa. St. 18; Edwards *v.* Jones, 1 Myl. & Cr. 226.

[7] Wells *v.* Tucker, 3 Binn. 366 (Pa.); Merchant *v.* Merchant, 2 Bradf. 432 (N. Y.).

[8] Hunt *v.* Hunt, 119 Mass. 474; Case *v.* Dennison, 9 R. I. 88.

[9] Wells *v.* Tucker, 3 Binn. 366 (Pa.); Clough *v.* Clough, 117 Mass. 83; Dresser *v.* Dresser, 46 Me. 48; Sessions *v.* Moseley, 4 Cush. 87.

[10] Sessions *v.* Moseley, 4 Cush. 87.

[11] Jones *v.* Brown, 34 N. H. 439; Cooper *v.* Burr, 45 Barb. 9; Ward *v.* Turner, 2 Ves. Sen. 443; Coleman *v.* Parker, 114 Mass. 30, dictum.

[12] Hatch *v.* Atkinson, 56 Me. 324.

[13] Delmotte *v.* Taylor, 1 Redf. 417 (N. Y.).

[14] Curtis *v.* Portland Savings Bank, 77 Me. 151; Hills *v.* Hills, 8 M. & W. 401.

[15] Chase *v.* Redding, 13 Gray, 418; Michener *v.* Dale, 23 Pa. St. 59; Borneman *v.* Sidlinger, 15 Me. 429; Bloomer *v.* Bloomer, 2 Bradf. 339.

8th. Gifts *causa mortis* are not favored by the law, because they open the door to the very frauds and impositions upon dying persons which the formalities of will-making are framed to prevent.[16] But as the spirit of fraud may lurk in any transaction, and as in some cases great injustice might be done by refusing to allow a transfer otherwise than by will, it seems best to uphold such gifts, remembering, however, that they offer peculiar opportunities for imposition, and should therefore be clearly and satisfactorily proved by sufficiently disinterested evidence to overcome their naturally suspicious character.[17] But when so proved, there seems no just cause to refuse to enforce such a gift, because another case may involve fraud, than to refuse to allow a man to spend his money or to eat because another may be a spendthrift or a glutton. The good and the bad should not be put under the same prohibition, unless it is impossible to distinguish them. At any rate, it does not seem consistent to hold that a man may pass the interest in his property by saying, "I hold this in trust for you," and then to hold that, although a donor says, "I want you to have the money in my trousers pocket hanging in that closet, and E. (who owned the house and was present) will give it to you," and E. did so, after the donor's death, yet there was no gift. (§ 615 *d*.) Nor does it seem altogether sensible to rule that "impossibility excuses all things,"—that necessity will justify omission of presentment and notice in respect to negotiable paper, or trespass on another's land, or tearing down his house, or even taking life, and yet that it will not justify omission to deliver a bank-book, however clear the evidence of a wish that the donee should have it, though from the circumstances it was also impossible to make a proper will. The language of the cases is broad enough to cover even such a combination of facts.

§ 612. **Gift of Deposit Causa Mortis.**—A delivery of the bank-book, with or without an assignment, with intent that the transfer shall take effect as a gift of the deposit upon the death of

[16] Hatch *v.* Atkinson, 56 Me. 324; Holley *v.* Adams, 16 Vt. 206; Delmotte *v.* Taylor, 1 Redf. (N. Y.) 417.

[17] Ellis *v.* Secor, 31 Mich. 185.

the donor from his existing illness, is a *donatio causa mortis*. Or the delivery may be to a third person for the donee,[1] and coupling the gift with a trust to bury the donor does not invalidate it.[2]

But delivery of the book is absolutely necessary to this form of gift, and the fact that it is beyond the power of the owner wishing to make the gift does not avail to excuse non-delivery, or make the gift complete without it.[3] The person *in extremis* must designate the gift and the donee, and must show intent that the property is to pass presently, and the intent must be carried out by actual delivery; and it has been said that delivery to an agent to deliver to the donee at the donor's death is not sufficient.[4] This seems to conflict with the law as laid down by Judge Foster,[5] who says that a donation is a gift conditioned to take effect on the death of the donor from his existing illness, and the reason of the matter seems against the Arkansas case, for the donor can give or transfer his property during life, subject to such conditions as he may see fit within the perpetuity limit. He could give A. property to be given to D. upon D.'s coming of age, or he could transfer the property to A. in trust for D. in any manner he saw fit. What solid reason can be given for distinguishing a transfer to A. to give to D. on the death of the donor? If it is said that the formalities of the wills act must be gone through with in order to prevent fraud, then be consistent and refuse to allow any *donatio causa mortis*, but do not distinguish where there is no difference.[6]

Moreover, the uniform holding of the courts is that the

[1] § 612. Pierce *v.* Boston Five Cents Savings Bank, 129 Mass. 425; Tillinghast *v.* Wheaton, 8 R. I. 536; Curtis *v.* Portland Savings Bank, 77 Me. 151. See Kingman *v.* Perkins, 105 Mass. 111; Kimball *v.* Leland, 110 Mass. 325; Foss *v.* Lowell Five Cents Savings Bank, 111 Mass. 285; Sheedy *v.* Roach, 124 Mass. 472; Davis *v.* Ney, 125 Mass. 590.

[2] Curtis *v.* Portland Savings Bank, 77 Me. 151; and see Clough *v.* Clough, 117 Mass. 83; Hills *v.* Hills, 8 Mees. & Wels. 401.

[3] French *v.* Raymond, 39 Vt. 623; Case *v.* Dennison, 9 R. I. 88.

[4] Newton *v.* Snyder, 44 Ark. 42.

[5] Kenistons *v.* Sceva, 54 N. H. 37.

[6] See Holley *v.* Adams, 16 Vt. 206.

title does not vest in the donee *causa mortis* until death of the donor.[7] If he recovers from the particular illness in which he made the delivery, the gift fails, even though he should die afterward of the same disease.[8] And it has been distinctly held that a *donatio causa mortis* differs from a gift *inter vivos* in respect to revocation of an agent's authority by death of the principal; for in the former, though the thing is not delivered by the agent to or accepted by the donee till after the death of the donor, it is sufficient.[9]

No Gift.

§ 613. **No Intent.** — Where H. gave her husband a check drawn by her payable to P., and the husband represented that H. intended him to have the money, whereupon P. cashed it for him, whereas H. intended P. to draw the money and retain it for her, as the mere delivery of the check to the husband should not have been relied upon by P. as sufficient evidence that the husband was meant to have the money, (for in that case it would have been much simpler to draw the check in favor of the husband,) H. recovered from P.[1]

§ 614. **Testamentary Intent.** — Where the intent of a donor in declaring a gift or trust is shown to be to retain control of the fund during his life, the property to pass from his control to that of the donee only at his death, it is in the nature of a testamentary disposition of property, and will not be sustained unless the formalities of the wills act are conformed to, except the case comes within the principle of a *donatio causa mortis*. For example, A. made a deposit "in trust," notifying the donees, and telling them that he (A.) would control the money while he lived, but at his death it would be theirs. This was not a completed gift.[1] So where a deposit by R. was "to

[7] Doty *v.* Willson, 47 N. Y. 580; Sessions *v.* Moseley, 4 Cush. 92; Tate *v.* Hilbert, 2 Ves. Jr. 120; Rhodes *v.* Child, 64 Pa. St. 18; Parker *v.* Marston, 27 Me. 196.

[8] Weston *v.* Hight, 17 Me. 287.

[9] Sessions *v.* Moseley, 4 Cush. 87.

[1] § 613. Hunt *v.* Poole, 139 Mass. 224.

[1] § 614. Nutt *v.* Morse, 142 Mass. 1.

be drawn by R. after her death by F."[2] And again, where a deposit was in the name of "J. B., order of A. B.," and on the last page of the book was written, "At my decease pay J. B. what may be due," and other deposits were made and money drawn by A. B. after this was written, there was no gift.[3]

A. deposited money in a savings bank in his own name, "payable also to B. in case of death of A." It did not appear that the alleged gift was made during the illness or peril of the donor, and it was not therefore good as a *donatio causa mortis*.[4]

§ 615. **No Delivery.** — Intent alone is not enough. A declaration of intent to give is no gift, nor is a parol promise to give, anything but a nude pact.[1]

(*a*) Where the entry was in the depositor's name, "Sub. to E. M.," and the depositor kept possession of the book, used some of the money, and never told E. M., there was no gift, for the indispensable element of loss of dominion was lacking.[2]

(*b*) So where a deposit was to "J. C., subject to his order or to the order of M.," his daughter, as the only mode in which deposits could be changed from one account to another in the bank was by payment on one account and deposit on the other, it was held that delivery of the book did not pass the money, it was subject to J. C.'s order.[3]

(*c*) Depositing money in a savings bank to the credit of another is *prima facie* evidence of intent to give the amount, but where the pass-book provides that the deposit cannot be withdrawn without producing the book, retention of this pass-book, and failure to notify the donee of the credit, indicate an intent not to perfect the gift at the time of the deposit.[4]

[2] Smith *v.* Speer, 34 N. J. Eq. 336.

[3] Burton *v.* Bridgeport Savings Bank, 52 Conn. 398.

[4] Parcher *v.* Saco & Biddeford Savings Bank, 7 Atlantic R. 266 (Maine, Jan., 1887).

[1] § 615. Kekewich *v.* Manning, 1 DeG. M. & G. 176; Trangiac *v.* Arden, 10 Johns. 293; Robinson *v.* Ring, 72 Me. 140; Martin *v.* Funk, 75 N. Y. 137.

[2] Northrop *v.* Hope, 73 Me. 66; Geary *v.* Page, 9 Bosw. 290.

[3] Murray *v.* Cannon, 41 Md. 466; Cox *v.* Hill, 6 Md. 274; Curry *v.* Powers, 70 N. Y. 212. See Ashbrook *v.* Ryon, 2 Bush, 228.

[4] Orr *v.* McGregor, 43 Hun, 529.

(*d*) Where A., about to die, told her son to get her bank-book, then in possession of her son-in-law, settle her debts, and divide the remainder among her children, it was held no gift *causa mortis*, because no delivery.[5] So where A. gave B. his savings bank-book as part funds to carry out the provisions of a written instrument, which he also gave to B., and told B. in E.'s presence that the remainder of the necessary money was in his trousers, which E. would give to him, and E. did give them to B. after A.'s death, it was held that there was no sufficient delivery of the money, and as the gift was entire, the whole transaction failed.[6]

[5] Case *v.* Dennison, 9 R. I. 88.

[6] McGrath *v.* Reynolds, 116 Mass. 566.

CHAPTER XXXVIII.

SAVINGS BANKS.

§ 616. Analysis.

Nature.

§ 617. The depositors in a savings bank stand in the position of stockholders in a commercial bank.

§ 618. The constitution of the bank determines the relation of depositors and the bank. The fact that the name of the bank contains the word "Savings" does not affect this relation, unless the depositor is misled thereby to his injury.

Depositor's Lien. By-law authorizing withdrawing deposit without reference to the state of the investment.

§ 619. Pass-Book only *prima facie* evidence.

§ 620. Rules and Amendments.

Those existing at the time a depositor opens an account form part of his contract with the bank.

§ 620 *a*. Amendments after this time do not bind him without notice, even as to sums deposited by him after the amendment. All dealings on his account are done under the contract fixed by the original deposit until both parties assent to a change.

§ 620 *b*. Production of book.

A common rule is, that any payment made to one producing the book shall discharge the bank. This is upheld by the courts,

§ 620 *c*. but the bank must exercise due care; the rule will not relieve it from responsibility for a negligent payment.

Loss of book does not forfeit the deposit.

A payment in violation of by-law makes the bank liable, though the depositor was negligent.

Insolvency of. See chapter on Insolvency.

§ 617. **Nature of a Savings Bank.** — The depositors are the bank, the trustees and officers are their agents for receiving and loaning their money;[1] and the profits belong to the depositors.[2]

[1] § 617. Cogswell *v.* Rockingham Ten Cents Savings Bank, 59 N. H. 44; Coite *v.* Soc. for Savings, 32 Conn. 173; Bunnell *v.* Collinsville Savings Soc., 38 Conn. 203; Osborn *v.* Byrne, 43 Conn. 155; Huntington

§ 618. **Effect of Name "Savings Bank." — Depositor's Lien.** — Although a bank may be called a savings bank, if it is really a stockholders' bank, where the capital is owned by the shareholders, the name will amount to nothing (unless it produces actual harm to a depositor by misleading him without his fault); and in such a bank a deposit creates the relation of debtor and creditor, and the depositor has no lien or trust in the bonds in which the money he deposits is invested, as is the case in a savings bank, even though the bank officers promise to hold the bonds for his benefit; such a lien can only be created by mortgage or pledge. A by-law authorizing a savings deposit to be withdrawn after giving due notice, without regard to the condition of the investment at the time, indicates that the depositor has no trust in the investment; otherwise, he would have to await the maturity of the note on which his money was loaned.[1]

§ 619. **Pass-Book only shows State of Funds.** — The pass-book only shows the state of the funds, and a depositor can prove by parol the terms of a contract for keeping a deposit.[1]

§ 620. **Rules and their Amendment.** — The regulations of a savings bank for withdrawing deposits, if properly made known to the depositor, are part of the contract between him and the bank. They are intended for the protection of bank and depositor against fraud and forgery.[1] And it is generally held that such a regulation in the shape of a by-law enters into the contract of deposit, and binds the depositor;[2] though in Connecticut it is said that it "must be inserted in the book and assented to by the depositor."[3]

v. Savings Bank, 96 U. S. 388; Burrill *v.* Dollar Savings Bank, 92 Pa. St. 134; Newark Savings Institution Case, 28 N. J. Eq. 552.

[2] Francestown Bank Case, 63 N. H. 138.

[1] § 618. Ward *v.* Johnson, 95 Ill. 215.

[1] § 619. Davis *v.* Lenawee County Savings Bank, 53 Mich. 163 (1884).

[1] § 620. Israel *v.* Bowery Savings Bank, 9 Daly, 507; Mitchell *v.* Howe Savings Bank, 38 Hun, 257.

[2] Levy *v.* Franklin Savings Bank, 117 Mass. 118; Donlon *v.* Provident Institution, 127 Mass. 183; Goldrick *v.* Bristol County Savings Bank, 123 Mass. 320; Burrill *v.* Dollar Savings Bank, 92 Pa. St. 134.

[3] Eaves *v.* People's Savings Bank, 27 Conn. 234.

(*a*) It must be carefully noted, however, that it is only the by-laws existing at the time of opening a deposit account that enter into the contract, irrespective of actual notice to the depositor. By dealing with the bank he adopts its regulations existing at the time; but if these are altered afterward notice of the change must be given the depositor in order to affect him, even as to his deposits made after the amendment is passed, for all his deposits are deemed to be made under the original contract. And it makes no difference though one of the by-laws at the time of opening the deposit account gave the trustees authority to amend the by-laws; such a rule cannot give power to change materially the contract *of the depositor without his knowledge*.[4] Amendment of by-laws.

(*b*) One of the commonest rules is, that the bank-book must be produced in order to draw the deposit, and that production of the book shall be authority to the bank to pay the person producing it. This is regarded as a reasonable and binding regulation, and if the bank pay to one having the book, there being no circumstances to excite suspicion and base an imputation of negligence on the part of the bank, the payment is good.[5] And even where the book was stolen, and the depositor was dead and his executor had published the usual notice to the heirs to appear and show cause against probate of his will, and the bank in ignorance of all this paid upon production of the book, it was found by the jury that the bank had not seen the notice, and had not been negligent, and the payment was upheld.[6] Production of book.

(*c*) But the bank must exercise reasonable care.[7] A stip-

[4] Kimins *v.* Boston Five Cents Savings Bank, 141 Mass. 33.

[5] Schoenwald *v.* Metropolitan Savings Bank, 57 N. Y. 418; Levy *v.* Franklin Savings Bank, 117 Mass. 448; Hayden *v.* Brooklyn Savings Bank, 15 Abb. Pr. N. S. 297; Goldrick *v.* Bristol County Savings Bank, 123 Mass. 320; Burrill *v.* Dollar Savings Bank, 92 Pa. St. 134; book stolen and deposit paid before notice had been given to bank of the loss of the book.

[6] Donlon *v.* Provident Institution, 127 Mass. 183.

[7] Appleby *v.* Erie County Savings Bank, 62 N. Y. 12; Sullivan *v.* Lewiston Institution, 56 Me. 507; Hayden *v.* Brooklyn Savings Bank, 15 Abb. Pr. N. S. 297; Eaves *v.* People's Savings Bank, 27 Conn. 229; Kim-

ulation between a savings bank and a depositor, that his deposit may be paid to any one presenting his book, does not relieve the bank from the duty of exercising good faith and reasonable care. The bank must not knowingly or recklessly pay to a wrongful possessor of the book;[8] and if there are circumstances calculated to excite the suspicions of a person of ordinary prudence and foresight, as if the presenter of the book is of a different sex from the depositor,[9] or if the signature of the presenter is so different from that of the depositor possessed by the bank that the discrepancy would be easily discovered by one competent for the position of cashier or teller,[10] the bank would be put upon inquiry; otherwise if the discrepancy would require a critical examination to detect it, especially if it is one about which experts might honestly differ.[10] If a bank agree to use its "best efforts" to make proper payments, it will not be excused by mere good faith and reasonable ordinary care in paying on production of the book.[11]

"Best efforts."

(*d*) If a depositor lose his book, the regulation that a deposit can be drawn only on production of the book is not to be construed as a forfeiture, but to have a reasonable interpretation in reference to its object, which is to protect both parties. A depositor in such case must show that the book is lost or destroyed, and may then draw his money.[12] The bank must be properly secured against loss by a second payment on a possible production of the book, and this may be done by a bond of indemnity,[13] which must be tendered by the depositor or his administrator before demanding payment.

Lost book.

(*e*) A by-law provided that deposits could be withdrawn

ball *v.* Norton, 59 N. H. 1; Levy *v.* Franklin Savings Bank, 117 Mass. 448; Heath *v.* Portsmouth Savings Bank, 46 N. H. 78.

[8] Kimball *v.* Norton, 59 N. H. 1 (1879).

[9] Allen *v.* Williamsburgh Savings Bank, 69 N. Y. 314.

[10] Appleby *v.* Erie County Savings Bank, 62 N. Y. 12; Israel *v.* Bowery Savings Bank, 9 Daly, 507.

[11] See note 9.

[12] Warhus *v.* Bowery Savings Bank, 21 N. Y. 546.

[13] Wall *v.* Provident Institution, 3 Allen, 96.

upon check properly witnessed. The bank was held liable for paying on forged checks, not thus witnessed, to the son of the old lady depositor, who had possession of the pass-book. It was not a question of negligence, and any contributory neglect of the depositor did not affect the matter; it was a payment contrary to rules, and the bank was held.[14]

Payment contrary to by-law.

[14] People's Savings Bank *v.* Cupps, 91 Pa. St. 315 (1879).

CHAPTER XXXIX.

INSOLVENCY.

§ 621. Analysis.

A complete treatment of this subject is not within our plan.

A. Definition of "Insolvent" and "In Failing Circumstances."

§§ 622, 623 *a*.

B. Preferences.

In case of special and specific deposits. § 567.

§ 623. Wrongful preferences.

§ 624. A lien resulting from a valid agreement prior to insolvency is good, though the deposit is not applied to satisfy it till after insolvency.

§ 625. Payments by a failing bank in the ordinary course of business re-

§ 626. ceived *bona fide* are good.

Payments out of the ordinary course of business will not stand, though the payee was ignorant of the bank's condition.

Debts lawfully incurred are preferred to *ultra vires* debts. § 749 *b*.

§ 627. Charter preferences sometimes exist.

§ 490 A. Checks given by the bank prior to insolvency are preferred to the general debts in those States where a check is an assignment. §§ 539–541.

§ 511 *k*. Holders of checks drawn on the bank are not preferred.

§ 718. States are not preferred, either as shareholders or depositors.

C. Rights of Depositors.

(1) Liability of officers who receive deposits, knowing of the bank's insolvency.

(*a*) At common law they are not liable, unless their conduct was

§ 628 *b*. fraudulent in receiving the deposit, as if they know that the

§ 629 *a*. bank is *hopelessly insolvent*. If they have a reasonably well-grounded hope of saving the bank, they are not liable.

§ 628. (*b*) Statute liability sometimes is broader, as in Missouri.

(2) Recovery of deposit.

§ 629. (*a*) If a deposit is not fully received (§ 289 *c*) by the bank in the usual way before it becomes formally insolvent, or if its reception is a fraud, it can be recovered in full.

Otherwise, a general depositor, even though the money be trust property, has no preference.

§ 630. (*b*) A specific deposit identifiable may be reclaimed.

§ 589 *b*. If not identifiable. (?) The best opinion is, No. See § 210.

(*c*) Money of others (e. g. the proceeds of a collection) received by
§ 631. the bank after formal insolvency may be reclaimed in full, if its ownership is determinable; otherwise, not.

D. Insolvency of a Savings Bank.

§§ 632, 632 *e*. The creditors are preferred to depositors.

§§ 632 *a*, *c*. Depositors cannot set off their ordinary deposits against debts due from them to the insolvent bank.

§ 632 *b*. But a special deposit that can be withdrawn on call, or a specific deposit, may be reclaimed in full or set off.

§ 632 *d*. A deposit is not made special merely by calling it so.

§ 632 *f*. Checks given by the bank before insolvency are preferred, except those given to depositors.

E. Insolvency revokes the power of a collecting bank to credit the proceeds on general account. §§ 248 *a*, 568 *e*.

F. Insolvency of the Issuing Bank is the risk of the taker of bank bills. (?) § 662.

G. Set-off of Bank Bills in case of insolvency of the issuing bank. § 641.

H. The Maker of a Note held by the bank may, in case of its insolvency, insist on the application of his deposit thereto. § 560.

§ 622. **Definition of "Insolvent" and "In Failing Circumstances."** — A bank is *insolvent* (within Missouri constitution and statutes) when, from the uncertainty of its being able to realize on its assets in a reasonable time a sufficient amount to meet its liabilities, it makes an assignment by which the control of its affairs and property passes out of its hands. A bank is "*in failing circumstances*" when in a state of uncertainty whether it will be able to sustain itself, depending on favorable or unfavorable contingencies, which in the course of business may occur, and over which its officers have no control.[1]

§ 623. **Wrongful Preference.** — A pledge made by the officers of a bank of a promissory note belonging to the bank to secure a depositor apprehensive of money he had allowed the bank to use was held good as being done in the hope of preventing the bank's failure.

Transfer in contemplation of insolvency. R. S. § 5242.

(*a*) But on rehearing it was held that the transfer was made in contemplation of insolvency, and should be set aside. The court said that "insolvency" is that condition of affairs

[1] § 622. Dodge *v.* Mastin, 5 McCrary, 401.

Definitions: "Insolvency." "Act of insolvency." "Contemplation of insolvency."

in which a merchant or business man is unable to meet his obligations as they mature in the usual course of business. An *act of insolvency* takes place when this condition is demonstrated, and the person has actually failed to meet some of his obligations. A bank is in *contemplation of insolvency* reasonably when the fact becomes apparent to its officers that it will presently be unable to meet its obligations. When the transfer under consideration was made, such knowledge existed, (though the officers might hope otherwise,) and the *natural and probable consequence* of the transfer was a preference; and since every person is to be presumed to intend the natural and probable consequence of his own acts, there was a legal intent to prefer, and this cannot be rebutted by showing another motive. The object of the law is to secure equal distribution, and prevent conduct which the actor can perceive in the exercise of reasonable foresight will prevent the fulfilment of that object.[1] After a vote of the directors to close their bank and go into liquidation, any transfer of the assets of the bank to a creditor whereby that creditor secures a preference will be presumed to be made with a fraudulent intent.[2]

§ 624. **A Lien is not a Wrongful Preference.** — Bank K. agreed with Bank Y., that, if the latter would accept certain drafts, K. would keep on deposit with Y. a sufficient deposit to meet the drafts, and Y. should have a lien on the deposit, and could charge the acceptances to it at any time. Y. knew at the time that K. was embarrassed. K. failed, and Y. immediately charged the acceptances to its account. K.'s assignee sued Y. for the deposit, but the court held that the transaction was not wrongful; the lien was concurrent with the obligation assumed by the Y., and though the act of charging was subsequent to insolvency, it related back to and derived its force from the prior agreement.[1]

§ 625. **Payments by Bank.** — Payment in the ordinary course of business, though after actual insolvency of the bank, is good,

[1] § 623. Roberts *v.* Hill, 23 Blatchf. 191.

[2] National Security Bank *v.* Price, 22 Fed. Rep. 697 (1885).

[1] § 624. Coats *v.* Donnell, 94 N. Y. 168.

its condition being known to the officers, but not to the payee.[1] But if a payment is made, not in the ordinary course of business, when the bank is actually though not avowedly insolvent, the payee cannot hold it, though he was ignorant of the bank's condition, much less when aware of it. A seeking of the creditor before the debt is due, is not paying in the ordinary course of business.[2]

Payment in and out of course of business.

§ 626. **Bona Fide Transactions in Regular Course of Business.** — An executor, who was also cashier of a national bank, purchased certain accepted bills of exchange and paid for them by his check as executor against funds of the estate in the bank. The bills were deposited in the bank in a box with papers of the estate. The bank failing, the receiver claimed the bills as assets of the bank. It was held that the purchase by the cashier was not as agent of the bank, but a *bona fide* purchase as executor, and that it was not in violation of the United States Revised Statutes, § 5242, forbidding the transfer of any bills of exchange owing to a national bank after commission of an act of insolvency; for the paper did not belong to the bank, nor was there a transfer of any deposit to its credit, for the deposit on which the executor drew was to its debit. Nor was the purchase within the spirit of the bankrupt law, though the cashier knew the bank was insolvent. He had hope of its recovery, and at any rate his action was not to avoid the operation of the law, but to secure cash to take up paper held by the bank, and so enable it to stand its examination.[1]

§ 627. **Charter Preferences.** — Sometimes a preference is provided for by the charter, as in favor of deposits of minors, insane persons, or married women. But where the charter provides for such preference in case of "dissolution," a corporation not insolvent in fact, but only unable to realize funds in time to meet its engagements, is not dissolved, and the pro-

[1] § 625. See Dutcher *v.* Importers & Traders' National Bank, 59 N. Y. 5; Belden *v.* Meeker, 47 N. Y. 307.

[2] See Brouwer *v.* Harbeck, 9 N. Y. 589, and cases in note 1.

[1] § 626. Tuttle *v.* Frelinghuysen, 38 N. J. Eq. 12 (1884).

vision does not apply.[1] In Tennessee bill-holders and holders of certificates of deposit are preferred.[2] (See §§ 655, 656.)

§ 628. **Liability of Officers for receiving Deposit, knowing of the Insolvency of the Bank.** — In an action under the Missouri statute of 1877, for receiving a deposit knowing the bank to be insolvent or in failing circumstances, the burden is on the officers of the bank to prove ignorance of the insolvency.[1]

(*a*) "Any bank officer who violates the provisions of § 918, Revised Statutes, by receiving deposits for his bank, or by assenting to the same, with knowledge that the bank is insolvent, or in failing circumstances, is individually responsible for such deposits so received, and the depositor may maintain an action against such officer for the amount of his deposit."[2]

(*b*) The mere fact that one deposited money in an insolvent bank, believing it to be solvent, and thereby lost it, gives him no cause of action at common law against the directors.[3] Mere evidence that a banker knew himself to be insolvent when he received a deposit, does not establish fraud for which the depositor may maintain an action to recover the amount notwithstanding the banker's discharge in bankruptcy.[4]

§ 629. **Recovery of Deposit.** — In case of a general deposit made before formal insolvency there can be no recovery in preference to the other creditors unless the deposit was kept separate, and not *fully received before formal* insolvency, or the receiving was under circumstances amounting to fraud on the part of the bank. When money is paid in by a customer after banking hours, and is put in a place by itself, and not entered in the regular books of the bank, and the bank fails and does not open on the next day, the necessity of failing having been already agreed upon by all the partners, the customer may reclaim his deposit and hold it as against the assignee of the

[1] § 627. Dewey *v.* St. Albans Trust Co., 56 Vt. 476 (1884).
[2] Mosby *v.* Williamson, 5 Heisk. 278.
[1] § 628. Dodge *v.* Mastin, 5 McCrary, 404.
[2] Cummings *v.* Winn, 89 Mo. 51 (1886).
[3] Duffy *v.* Byrne, 7 Mo. App. 417 (1879).
[4] Sheldon *v.* Clews, 13 Abb. N. C. 69 (1883).

bankrupt.[1] Though in another case, wherein it was shown that the bankers were in the habit of receiving, and the customer was in the habit of making, deposits after banking hours, and that such deposits were always regarded and treated by both parties as if regularly made during banking hours, and the bankers had not determined upon the necessity of failing when the deposit was made, a contrary decision was reached.[2]

In this case there was no fraud imputed to the bank, and the deposit was fully received in the usual manner, before formal insolvency occurred. Mere knowledge of insolvency is not a sufficient ground for recovery; the title passes to the bank unless there is fraud, or the deposit is kept separate, with intent that the title shall not pass. (§ 589.)

(*a*) A banker must not receive deposits if he knows himself to be hopelessly insolvent, and the mere promise of another to carry him through, without security, is not sufficient basis on which to do business. The question for the jury is whether the banker was honest. It is not necessary that he should make misrepresentations. If he knows himself to be irremediably insolvent, he must disclose his situation before receiving a deposit.

Insolvent bank liable for receiving deposit.

The mere fact of insolvency does not make it dishonest to receive a deposit, but hopeless insolvency does. It is fraud to take money that you know you will not be able to repay.[3] Under § 2814 of the Code, [receiving a deposit, knowing or having reason to believe the bank insolvent, and without informing the depositor,] is a crime, no matter what may be the purpose or hope of the person receiving it; it is for the protection of the public, and the bankrupt cannot say he received the deposit hoping to pull through. But in case of an attachment by such depositor to recover as for a debt fraudulently contracted, the bracketed facts are not conclusive of fraud, but are circumstances for the jury in considering the question of fraudulent intent on the part of the bankrupt. "It is impos-

[1] § 629. Threlfal *v.* Giles, cited 2 M. & Rob. 492; Sadler *v.* Belcher, id. 489.

[2] Ex parte Clutton, 1 Fonb. 167.

[3] Rochester Printing Co. *v.* Loomis, 45 Hun, 93.

sible to conceive of fraudulently contracting a debt, without ascribing to the debtor the purpose to defraud." [4] A general deposit of trust money stands on a level with other deposits in case of insolvency of the bank.[5]

(*b*) A deposit was made on condition that the bank would pay a certain sum to a widow during her life, the remaining income, if any, to go to her children. The bank had power by charter to accept and execute trusts, but no preference of such trusts was declared in the organic law; and upon failure of the bank, the Chancellor held: "If it be admitted that the money in question was received by the institution on a trust, the right of the complainants to a decree directing payment of the fund out of the assets of the institution in preference to the claims of other depositors would not be apparent. If it received the money to hold it in trust, it was clearly its duty to observe its obligations as trustee, among which was that of keeping the funds and investment separate, so that they might be identified and capable of specific claim on the part of the beneficiaries; and if, neglecting or disregarding its duty in that respect, it mingled the funds of the trust indistinguishably with those of depositors, the right of the complainants to indemnity in preference to the claims of the depositors would be questionable at least. But the evidence does not establish the existence of any trust different from that on which general deposits were held." [6]

When bank is trustee and funds are mingled, no preference.

Duty as trustee.

§ 630. **Special and Specific Deposits.** — Special and specific deposits, if actually kept separate so that they can be identified, may be reclaimed. The bank had no title and its creditors can have none. But if such deposits are mingled indistinguishably with the bank's funds, the ground of preference fails; the owner simply has a claim against the bank for damages, and should not be preferred to other creditors. (§ 589 *b*.) It is a case in which equality is equity.[1]

[4] Hughes *v.* Lake, 63 Miss. 557.

[5] Fletcher *v.* Sharpe, 9 N. W. R. 142 (Ind.).

[6] Vail *v.* Newark Savings Institution, 32 N. J. Eq. 631 (1880).

[1] § 630. Vail *v.* Newark Savings Institution, 32 N. J. Eq. 631.

Two banks kept a running account, each acting as collecting agent for the other. Each week a balance was struck and remitted. The avails of these collections were never kept separate from the other funds of the bank, or distinguished therefrom in any way. Held, that their relation was simply that of debtor and creditor, and upon the failure of one, the other acquired no lien on any specific fund, nor any preference over creditors generally.[2] The depositor of money for a specific purpose can claim no preference in case of the bank's insolvency.[3] The contrary, though less reasonable, is more frequently held. (§ 567 *a*, *b*, and § 568 *d*.)

Proceeds of collection.

§ 631. — **Money of others received by the Bank after Formal Insolvency may be recovered in full, if their Ownership is determinable.** — Money received upon collections subsequent to formal insolvency belongs to the owner of the paper, and can be recovered in full if the said money can be traced to the particular paper;[1] but if this is impossible, as if a correspondent collects a mass of paper for the failing bank before its insolvency, and remits part of the proceeds before the insolvency and a part afterward, not having kept the proceeds of the various notes separate, none of the owners of the paper so collected could trace the proceeds of his own paper into the fund transmitted after insolvency, and all should take equally.

In Ohio, a case arose in which it appeared that the transmitting bank was accustomed to forward a considerable amount of paper to the collecting bank for collection. Soon after the plaintiff's draft was forwarded, the first bank failed. Prior to its failure the second bank had made a large number of collections for it, and had remitted to it various sums on account of these, and after the insolvency had paid over the balance remaining due on account of all the collections to the assignee in insolvency. It was held that the owner of the draft in question had no specific lien on the funds of the insolvent bank, in the hands of the assignee, to give him a preference

[2] People *v.* City Bank of Rochester, 93 N. Y. 582.

[3] Brandywine Bank's Assigned Estate, 1 Chester Co. 431; Parkersburg Bank's Appeal, 6 W. N. Cas. 394.

[1] § 631. Haven's Petition, 8 Bened. 309.

over the other creditors; but that he must prove his claim and take his dividend like the rest.[2] It was impossible to prove that any part of the balance at the time of the insolvency arose from the particular draft of the plaintiff.

§ 632. **Insolvency of a Savings Bank.** — The creditors of a savings bank are to be paid in full, in preference to depositors.[1]

Depositor no off-set in case bank is insolvent.

(*a*) A savings bank is an institution for the receiving of deposits to be invested for the benefit of the depositor, not that of the corporation, as in the case of a commercial bank. The increase and the original all belong to the depositor after deducting necessary expenses of management, and if the deposit is lost, it is the loss of the depositor, and he cannot in case of insolvency offset a debt due from him to the bank against such loss,[2] any more than any principal can offset a debt due to A. against funds that he put into A.'s hands as his agent to invest to the best of his discretion, and which have been lost. The principal has no claim against the agent for the loss of the funds, while the agent has a valid claim for the debt due to him from the principal.

(*b*) But a special deposit that can be withdrawn on call may be offset,[3] and so may a specific deposit made for the very purpose of being applied to the depositor's debt to the bank, if the bank officers knew of such purpose, though insolvency occurred before the money was formally applied to the debt.[4]

(*c*) An agreement by a savings bank to hold the deposit of one party as security for the overdrafts of another was held

[2] Reeves *v.* State Bank, 8 Ohio St. 465.

[1] § 632. People *v.* Mechanics & Traders' Savings Institution, 28 Hun, 375; Huntington *v.* Savings Bank, 96 U. S. 398; People *v.* Security Life Ins. Co., 78 N. Y. 122.

[2] Osborn *v.* Byrne, 43 Conn. 155 (1875); Stockton *v.* Mechanics & Laborers' Savings Bank, 32 N. J. Eq. 163; Sawyer *v.* Hoag, 17 Wall. 610; Hall *v.* Harris, 59 N. H. 71; Railroad Co. *v.* Howard, 7 Wall. 392; United States *v.* Eckford, 6 Wall. 484.

[3] Hall *v.* Harris, 59 N. H. 71.

[4] Osborn *v.* Byrne, 43 Conn. 155.

not enforceable by the debtor after the insolvency of the bank; this would indirectly contravene the New York Revised Statutes (6th ed.), c. 399, § 4, prohibiting fraudulent transfers of the effects of insolvent corporations.[5] The agreement did not make it obligatory at any time upon the bank to apply the deposit to the overdraft; it had the liberty of so doing, but on approach of insolvency it was its clear duty not to do so.

Fraudulent transfer of bank's assets.

(*d*) A New Jersey savings bank received two kinds of deposits; the first class were payable at thirty days' notice, the second were to be paid without any notice, did not participate in the profits as the first class did, and were called "special deposits." It was held that these specials were not entitled to preference; they were mingled with the general funds of the bank, and were more like the general deposits of a commercial bank than true special deposits.[6]

So called "special deposits" not preferred.

(*e*) The court held in this case that debts and expenses contracted by the bank in its ordinary business should be preferred to the depositors, who held the position of stockholders.

Debts preferred to deposits.

(*f*) Also, that money paid the bank for its check, which was dishonored, presumably went into the funds, and the holder should be preferred; but that checks given to depositors on account of their deposits were not to be preferred.[6]

Checks preferred, except those to depositors for their deposits.

[5] Van Dyck *v.* McQuade, 18 Hun, 376.

[6] Stockton *v.* Mechanics & Laborers' Savings Bank, 32 N. J. Eq. 163.

CHAPTER XL.

BANK BILLS.

§ 633. Analysis.

A. Issue. See E, below.

§ 634. (1) Power to issue not inherent.

(2) Constitutionality of

§ 664. Issue by banks which are State institutions.

§ 664. § 665 *a*. "Bills of credit" cannot be issued by "States"; that is, "paper issued by the sovereign power, containing a pledge of its faith, and designed to circulate as money."

§ 664. § 665. But the bills issued by "State" banks are issued primarily on the faith of the capital of the banks themselves, and are not within the prohibition, even though the State guarantee their ultimate payment.

B. Definition. — A Bank Bill

§§ 635, 636. Is a promissory note of the bank, payable on demand, (if payable at a future day, though meant to circulate after that day, it is a *post note*, governed, however, by the same rules as bank bills, except that it is entitled to grace,) and designed to circulate as money for an indefinite period.

C. Bill-holder's Rights.

(1) Bank bills as legal tender.

§ 637. (*a*) They are *not* a legal tender, nor can they be made so by State statutes, except as against the issuing bank or in payment of State taxes.

(*b*) But they are *a good tender, unless objected to* on the ground of not being money, and the right of set-off makes them practically equal to a legal tender against the bank, even at common law.

(*c*) Insolvency of the bank raises serious questions. The just view seems to be that the bills are no longer unqualifiedly a legal tender against the bank, (even under a statute declaring them in general terms a legal tender to the bank,) for the question is no longer one between the bank and the holder, but between one holder and another; and to allow bills obtained after notice of insolvency to be a legal tender or a set-off would practically result in preferring some holders to others, and in allowing those who owe the bank to escape with less than a full payment of just debts in any case where the assets of the bank are insufficient to pay the bills in full. See § 641 *b*, and D, below.

§ 637 *c*. North Carolina, however, dissents. And see Maryland, § 641.

(2) Set-off.

§ 639. Subject to the general principles of set-off, 323 bank bills, ob-
§ 640. tained at any time prior to the suit by a *solvent* 640 bank, may
§ 641. be set off; but if the bank is *insolvent*, 641 they must have
§ 641 *a*. been obtained prior to the knowledge of the insolvency, unless perhaps under an explicit statute. See C. 3, this analysis.

So long as the bills continue to circulate as money, the holder is not affected by notice; but if he has actual knowledge, or if the bills cease to circulate as money, and become the subject of a special bargain in each transfer as to the value for which they shall be received, they cannot be used in set-off at par.

(3) Statute of Limitations.

§ 643. Does not run against a bank bill; it is continually being reissued by the bank, or may be, and to apply the statute would defeat the very intent of bank bills, viz. indefinite circulation as good notes.

But if the bills cease to circulate, as when the bank suspends, the statute begins to run, unless State law otherwise provides, as in Tennessee.

(4) Presentment and demand.

§ 644. Generally no demand necessary before suit.

§ 645. In case of insolvency of the bank, it is best to make demand, for if interest is allowed, it will be reckoned from demand.

(5) Redemption.

§ 646. Upon presentment, it is the bank's duty to redeem with reasonable despatch, and artifices for delay are condemned by the courts.

The intent of the bank and the spirit of the law control; and if a *bona fide* intent to redeem with due rapidity is apparent, then, in case of delay, the bank can only be held for negligence in having insufficient facilities for business; but if the intent be evident to cause delay for the bank's advantage, it will be deemed equivalent to failure to redeem.

Banks may refuse to pay after banking hours, but must use the right reasonably, and cannot refuse to complete paying a parcel of bills, unless it would so far overstep the hour as to be a substantial inconvenience.

(6) Lost or destroyed bills. See Lost Checks, § 395 A.

(*a*) A bank should not be obliged to pay a bill more than once, and therefore, as any *bona fide* holder can demand payment, the bill must be surrendered to the bank, or the bank must be put in a position as secure as if the bill were surrendered, before it can be justly required to pay the amount of it.

(*b*) The true owner, however, is justly entitled to the money represented by the bill lost or destroyed, provided the bank can be made safe.

Under these principles,

§ 648. (*a*) If the bearer can show that certain specific bills have been destroyed, and can give a bond of indemnity, he can

Destruction of whole bill.

recover of the bank; but generally, if he cannot prove what *particular* bills were destroyed, he cannot recover, for he provides no means by which the bank can protect itself against imposture.

This, however, seems merely a matter of evidence. Aside from questions of certainty, the last owner has a right to the money, and the bank has no right to retain what belongs to another; and perhaps cases might arise in which the destruction of a certain amount of bank bills could be so clearly proved that the bank should be held, though the numbers could not be shown.

(*b*) The holder of a portion, upon proving that he is entitled to the whole bill, may recover of the bank; for the missing portion is not negotiable, and the bank will never have to pay again, unless through some mistake in verdicts.

§ 650.

Loss or destruction of part.

§ 651.

A published notice by the bank, that it will not pay on severed notes is of no effect; one party to a contract cannot change it. Against any possible trouble or expense that may arise from having to fight the missing part should it reappear, a bond of indemnity should be given.

§ 650 *a*.

It makes no difference how much the bill may be mutilated; the numbers may be erased or changed; if the bill can be identified as a genuine bill issued by the bank, recovery can be had.

Some authorities hold that no bond is necessary.

Lord Ellenborough held that a portion of a bill is negotiable, and the case would then be like that of loss of the whole bill.

§ 649.

§ 649 A.

(*c*) When the whole bill is lost, there are two possibilities, either of which may take the shape of reality, and it is impossible to predict the outcome. (1) The bill may be entirely and forever lost, or (2) it may be lost to the former owner, and yet come to the hands of a *bona fide* holder, who will have a right to demand payment from the bank. The plaintiff on a lost bill cannot therefore, by the nature of the case, prove that he is absolutely entitled to the money, but he can show that as between him and the bank he is entitled to the benefits of the money until it is claimed by a *bona fide* holder, if the bank can be made secure against loss by a second claimant. The probability of loss is so much greater in this case than in case of a claim upon evidence of the destruction of a bill, that some courts have thought a bond of indemnity an insufficient security in these cases. Other courts do not draw the line in that way, and such bond is not in any case an absolute security, for the obligor and sureties may all be insolvent when the time comes to call upon them. However this may be, the rights of the parties, security to the bank, and the use of or interest on the money represented by the bills to the owner, can be attained either by agreement of the bank to pay interest, or by the bank's paying the amount to the owner on receiving goods, stocks,

Loss of whole bill.

or government bonds in sufficient quantity to cover the risk, such collateral to be held by the bank to answer the possible claims of a *bona fide* holder, while the interest on said security is to go to the owner.

(7) Stolen bill. Rights of holder.

§ 658. If complete when stolen, the bank is liable to a *bona fide* holder, but not if the bill is incomplete, so that forgery intervenes to supply the defect; the bank is not liable, even though negligent in leaving the bills exposed. The forgery, not the negligence, is the proximate cause of loss.

§ 652. (8) Title and suits.

(*a*) Title passes by delivery, and therefore possession is *prima facie*

§ 653. evidence of title; and in this country the burden is on the bank to show that the holder is not a *bona fide* holder for value, in the usual course of business, though in England, if fraud or theft is shown, the burden is put on the holder.

(*b*) The bank can always pay the bearer with safety, unless it has reason to believe that his title is bad.

(*c*) Bank bills may be *protested*, and a subsequent taker is affected with equities, whether he knew of the dishonor or not.

§ 654. (*d*) A finder's right is good against any one but the owner, and he may recover the bills from one with whom he deposited them, though he found them on the premises of the depositary.

§ 656. (9) Liability of stockholders to bill-holders.

§ 657. (10) Liability of officers to bill-holders.

(11) Preference of bill-holders.

§ 655. At common law they are not preferred to other creditors, but the importance of putting the money of the country on as solid a basis as possible has induced legislative preference, and

§ 656. also statutes imposing a liability on stockholders for the benefit of bill-holders.

D. Transfer of Bills.

(1) Forged bills. See Forged Checks, § 461.

§ 659. Payment or deposit of forged bills is a nullity, but the receiver must give prompt notice on discovery.

§ 659 *a*. If the bills purport to be those of the receiving bank, it is held

§ 660. to great diligence in examining them, and after a brief time (perhaps one day) cannot correct the mistake. (Quære, whether the bank could not demand correction at any time, upon showing that the depositor is in no worse position than if the bank had refused the bills.)

§ 661. Change of numbers vitiates. See *contra*, § 650 *a*.

(2) Warranty of solvency. See § 289 *d*.

§ 662. By agreement or representation, the solvency of the issuing bank may be warranted by the transferrer; but there is no implied warranty any more than of the value of goods sold or that a horse sold has not in his system the germs of disease. The only way to secure any certainty in transactions relating to bills circulating through thousands of hands is to draw a line

at each completed transfer, and not allow hundreds of suits to arise, and faith in money transactions to be undermined by opening up a long series of transfers for any reasons short of the vital ones of bad faith or forgery.

§ 662 *d*. However, in case deposited bank bills are not those of the depositary, and they are treated just as a deposit of ordinary negotiable paper, and sent to the issuing bank at once, there seems no just reason to deny the receiving bank the right to cancel the credit on dishonor of the bills; it is not a case of absolute payment.

§ 662 *a*. And some cases hold that, if the bank is insolvent at the time of any payment in bills, the transferrer must bear the loss, though both parties are ignorant of the insolvency.

§ 662. If the transferrer knows of the insolvency, of course the loss is his.

E. Bank Bills

§ 666. May be paid out by other banks than those issuing them, unless there is a statute restriction; and even such statute has been held not to apply to bills of other banks received on general deposit, becoming thereby the property of the receiving bank.

§ 638. F. Bailment of Bills

§ 663. As collateral security.

§ 642. G. Note Payable in Bank Bills.

§ 634. **Form and Characteristics.** — The function of banks, which is of the greatest public importance, is that of issuing notes or bills designed to circulate in the community as current money. The power thus to issue is not inherent or essential in the banking business, and is not necessarily implied from the conference of a general power to do banking business. On the contrary, it must be distinctly and in terms conferred in the incorporating act, or it will not be enjoyed.[1]

Power to issue not inherent.

§ 635. **Definition of Bank Note.** — The instruments thus issued for circulation are technically and more accurately designated as bank notes, and are ordinarily so called in England. The name bank bills has, however, come to have the like significance, and in the United States is more frequently used in ordinary parlance. The law, even for the purpose of interpretation in criminal causes, recognizes the terms as equivalent and interchangeable.[1] A bank note or bill, so far as its

[1] § 634. See the National Banking Act, §§ 8, 21 *et seq.*, and Pub. Stats. of Mass. 679.

[1] § 635. Eastman *v.* Commonwealth, 4 Gray, 416.

language goes, is simply the promissory note of the corporation. It expresses nothing but the corporate engagement to pay a certain sum. That the payment is to be made on demand, and without interest, may or may not be stated. The presence of the statement is not indispensable, for it would always be deemed to be implied. But a bank bill, though in form a promissory note, is yet so different from it in the purpose for which it is put forth, and the legal doctrines applicable to promissory notes are so far qualified in their application to bank bills in consideration of this difference of purpose, that it seems better to regard them as distinct, though cognate, instruments. The one must be, and the other may be, negotiable by mere delivery. But the touchstone by which we can determine to which class any individual paper belongs is furnished by the question whether or not it was issued for the purpose of passing current as money for an indefinite period, in daily transactions among the people. If it was so intended, it is a bank bill. Bank bills are in the United States ordinarily printed on a peculiar paper, called "bank-note paper," colored or tinted in part or wholly, ornamented with vignettes, and having the figure and word designating the value printed in numerous places and in fanciful patterns upon each. But none of these features are essential to the character of the instrument as a bank note. None of them, except the peculiar species of paper and a water-mark skilfully inserted into the texture, appear in the notes of the Bank of England. Such peculiarities have come by custom to be regarded as sufficient evidence that the document which bears them is a bank bill. But intrinsically they have no such force in impressing this legal character. The presence of them all would not make a document a bank bill, if it was not such in fact, and was not issued to circulate as such. Neither would the absence of them all prevent the document from being a bank bill, if its language and the object of its emission ought to render it such. A bank would have a perfect right to have all its bills written by hand on ordinary letter-paper, and to print all its promissory notes

How distinguished from other notes.

Intended to circulate.

Non-essentials.

on decorated bank-note paper, if it should choose, and the legal character of neither document would be affected by the fact.

§ 636. **Must be payable on Demand.** — A bank note or bill must be payable over the counter immediately upon demand made in business hours at any time after its issue.

Post note.

If it be made payable at any future time certain, or at any stated number of days after sight, though designed to circulate after that time, it is not a bank bill, but a post note. A post note is of course closely like a bank note, and at least after the time of payment has arrived would probably be governed by the same rules, rather than by the rules applicable to promissory notes. Still it is, properly speaking, a distinct instrument.[1] It may be issued by any bank which is empowered in general terms to issue paper for circulation, if no limitation or description of the species of paper which may be issued is added.[2] Post notes of a bank are not subject to the rules of demand and notice, for they are intended to circulate as money,[3] but they are entitled to grace.[4]

§ 637. **Bank Bills as Legal Tender.** — Bank bills are not money, in the strict sense of the term; that is to say, they are not legal tender, even to pay debts due the bank itself,[1] though they would pass as cash under a bequest.[2] A sheriff takes bank bills in payment of an execution at his own risk.[3] And they are not a good tender in court for satisfaction of a judgment.[4] They pass current as if they were money only by virtue of a general understanding or tacit agreement to that effect.[5] No State even has power to render them such

[1] § 636. Fulton Bank *v.* Phœnix Bank, 1 Hall, 577.

[2] Campbell *v.* Mississippi Union Bank, 6 How. (Miss.) 625.

[3] Key *v.* Knott, 9 Gill & J. 342.

[4] Sturdy *v.* Henderson, 4 B. & Ald. 592; Perkins *v.* Franklin Bank, 21 Pick. 483; Staples *v.* Franklin Bank, 1 Met. 43.

[1] § 637. Coxe *v.* State Bank, 3 Halst. 172.

[2] Chapman *v.* Hart, 1 Ves. Sen. 271.

[3] Armsworth *v.* Scotten, 29 Ind. 495. *Contra*, Scott *v.* Commonwealth, 5 J. J. Marsh. 643; Governor *v.* Carter, 3 Hawks, 328.

[4] Hallowell, etc. Bank *v.* Howard, 13 Mass. 235; Coxe *v.* State Bank, 3 Halst. 172.

[5] Bank of the United States *v.* Bank of Georgia, 10 Wheat. 333; Miller

by any method of legislative enactments. A law undertaking to do so would be simply void, as directly contravening Article I. sec. 10, of the Constitution of the United States, which declares that no State shall make anything but gold or silver coin a legal tender in payment of debts. They are, however, a good tender unless they are specially objected to at the time on the ground that they are not legal money:[6] *provided*, and it is an essential proviso, that they are current bills passing at their par value in business transactions at the place where they are offered, and that they are redeemed in legal tender for their full face value upon presentation at the counter of the bank issuing them.[7]

No State can make them a legal tender, except against the bank, or in payment of taxes.

Not good tender if objected to on the stated ground that they are not legal tender.

(*a*) Payment in the bills of a suspended bank is not payment, though at the time the fact of the suspension is not known to either party.[8]

(*b*) And though they cannot be made money or legal tender among the community generally, they may be made so as towards the bank itself which issued them. Indeed, this has not unfrequently been done by several among the States.[9] It

v. Race, 1 Burr. 457; Corbit *v.* Bank of Smyrna, 2 Harr. 235; Handy *v.* Dibbin, 12 Johns. 220; Wright *v.* Reed, 3 T. R. 554; Morris *v.* Edwards, 1 Ham. 189; Edwards *v.* Morris, id. 524; Bradley *v.* Hunt, 5 Gill & Johns. 58; Morrill *v.* Brown, 15 Pick. 177. It has also been held that a declaration averring a loss of money in bank notes is not open to objection on the ground that bank notes are not money. Towson *v.* Havre de Grace Bank, 6 Har. & Johns. 47.

[6] Bank of the United States *v.* Bank of Georgia, 10 Wheat. 333. A like rule prevails also in England. Grigby *v.* Oakes, 2 Bos. & P. 526; Wright *v.* Reed, 3 T. R. 544; Anon., 1 Eq. Ca. Abr. 318; Polglass *v.* Oliver, 2 C. & J. 15; Gillard *v.* Wise, 5 Barn. & Cr. 134; Pickard *v.* Bankes, 12 East, 20; Thomas *v.* Todd, 6 Hill, 340; Codman *v.* Lubbock, 5 Dowl. & R. 289; Owenson *v.* Morse, 7 T. R. 64.

[7] Ward *v.* Smith, 7 Wall. 447.

[8] Ontario Bank *v.* Lightbody, 13 Wend. 101.

[9] Dunlap *v.* Smith, 12 Ill. 399; Exchange Bank *v.* Knox, 19 Grat. 746; Union Bank *v.* Ellicott, 6 Gill & J. 363. But in Illinois an exception is made where the indebtedness to the bank arose upon the debtor's subscription for shares of the capital stock. This he must discharge in good

must be done by statute, for in the absence of legislation there is no rule of the common law which enables a debtor to a bank to discharge himself by an offer of the amount in the bills of the bank.[10] His only course is to avail himself of his right of set-off in respect of the notes.[11]

(*c*) Even the statutes do not apply to bills obtained after notice of an assignment for creditors.[12] In North Carolina, however, it is held that a bank is bound by the very act of issuing a currency to receive it in payment, and that, as this obligation is a part of the contract, even the legislature could not alter it. It is not a question of set-off, but a question of the right of a bill-holder to use the bills as a legal tender, and it makes no difference though they are acquired by the one who tenders them after execution issues against him. The assets of the bank had been put in the hands of a commissioner for the benefit of creditors.[13]

Insolvency. Legal tender. Statutes. Set-off.

(*d*) This case does not seem to us to go to the bottom of the matter. So long as the bank is solvent, the tender of its notes to it is a question purely between the bank and the one who makes tender, and it should not be allowed to refuse them. The right to compel the bank to take them exists substantially in the right of set-off. But *where the bank becomes insolvent* the question is no longer really between the bank

money. Niagara Bank *v.* Roosevelt, 9 Cow. 409; Bailey *v.* Bacon, 26 Miss. 455; Moise *v.* Chapman, 24 Ga. 249; Commercial Bank of Columbus *v.* Thompson, 7 Sm. & Mar. 443; American Bank *v.* Wall. 56 Me. 167. To the same effect is also a case in Pennsylvania, which however makes it a necessary proviso that the bills, if offered to an insolvent bank, should have been obtained before the insolvency. Thorp *v.* Wegefarth, 56 Pa. St. 82.

[10] Suffolk Bank *v.* Lincoln Bank, 3 Mason, 1; Hallowell & Augusta Bank *v.* Howard, 13 Mass. 235. In the absence of any statutory provision on the subject in Massachusetts, the rule of the common law necessarily governed in this case. But see American Bank *v.* Wall, 56 Me. 167.

[11] Foster *v.* Wilson, 12 M. & W. 201, per Parke, B.

[12] Exchange Bank *v.* Knox, 19 Grat. 746; Saunders *v.* White, 20 Grat. 327.

[13] Blount *v.* Windley, 68 N. C. 2; Exchange Bank *v.* Tiddy, 67 N. C. 169; Bank of Charlotte *v.* Hart, 67 N. C. 264.

and the debtor holding the notes, but the holder's rights are affected by the rights of other creditor-debtors of the bank. At common law the bill-holder has no right to preference over any other creditor, but, as is very proper, such preference is given by statute; nevertheless one bill-holder is not to be preferred to another. If the assets are not sufficient to pay all the bill-holders in full, equity calls for an equal *pro rata* distribution, and this would be defeated by holding that an insolvent bank must take its bills at par. If the holder acquires the bills after insolvency, and therefore perhaps for less than their face, justice between him and other creditors requires that he should not profit from their misfortunes by obtaining more than he gave.

Suppose the bank owes A. and B. each $1,000 on bills they hold, and C. owes the bank $1,000, the bank not being indebted to him. This is the condition of things at the time of insolvency. Now it is perfectly just that C. should pay in the $1,000 he owes; he got value for it, and his liability is in no way affected by the insolvency. Also A. and B. have equal claims, and therefore the $1,000 paid in by C. should be equally divided, each getting $500 on the bank notes he holds. But suppose that bills obtained after insolvency could be set off or used as legal tender, B. could transfer his $1,000 worth of bills to C., for $700 say, C. could pay over these in settlement of his debt, and A. would get absolutely nothing, while C. actually makes a speculation, paying his debt with $300 less than the value he had received at the creation of his obligation. If C. had taken the bills before the bank became insolvent, and therefore, presumably at least, for full value, he should be allowed to set them off; for in that case he does not really owe the bank anything at the time of insolvency, and there is no bad faith or fixing up of schemes to get more than a fair share of insufficient assets, or to pay off a debt with less than its value.

Where the charter of a bank established under State legislation provides that the bills of the bank shall be taken in payment of taxes, this does not create such a contract between the State and the corporation as to

Taxes.

preclude the State from afterward passing a law forbidding such bills to be longer received in payment of taxes.[14]

§ 638. **Bailment of Bank Bills as Collateral Security.** — Where a parcel of the bank bills of a bank are deposited with the bank as collateral security for a loan, it has been held that the deposit constitutes a bailment, and does not create a debt. It is the duty of the bank to keep and to return *in specie* the identical bills contained in the parcel and deposited with it. In the event of its not returning the collateral upon proper demand by the bailor, it will be liable to him in an action of trover.[1]

§ 639. **Set-off.** — If a bank sues a debtor, the debtor may set off, subject to certain restrictions, the amount of bills of the bank held by him. Though in Massachusetts, in the case cited in § 640, Hallowell & Augusta Bank *v.* Howard, it was held that the defendant could not be in a position to avail himself of the set-off until he had recovered a judgment on his bills. The right of set-off is for the nominal or face value of the bills, for it is this amount which the bank in fact owes the holder of them. The credit of the bank may be so poor that its bills are depreciated, but this is not a matter of which the bank itself can be permitted to take advantage as against the holder. Bank bills may still be legally circulated although they pass for less than their par value, and their legal character remains unaltered as the promise of the bank to pay a certain sum, upon the faith of which promise, at one time or another in the past, the bank has actually received that sum, and to the holder of which promise the bank still remains liable to refund that sum. If its affairs have since been so badly managed that the holder has been able, or has been obliged, to receive the bill as a representative of a less amount or value, this is not a matter which the bank can set up to diminish its indebtedness, which has long since accrued in consideration of full value received.[1] But though the meas-

[14] Graniteville Manuf. Co. *v.* Roper, 15 Rich. Law, (S. C.) 138.

[1] § 638. Abrahams *v.* Southwestern R. R. Bank, 1 Rich. (S. C.) N. S. 441 (Willard, J. dissenting).

[1] § 639. Robinson *v.* Bealle, 26 Georgia, 17; Taylor *v.* Cook, 14 Iowa,

ure of value is thus rigidly in favor of the holder of the bills, yet the right of set-off will accrue at all only under certain circumstances as follows.

§ 640. **When the Bank is solvent,** a holder must have come into possession of the bills at some time prior to the institution of the suit by the bank. The date of the bills is a wholly irrelevant matter.[1] The defendant's right of action is an original one, accruing to him directly and primarily at the moment when he becomes the bearer of the bills. He does not take the contract as assignee of the former holder who pays over the bills to him. No holder has anything to do with the possession or rights of any predecessor in possession. No connection or relationship of a legal character arises between them by reason of the naked act of transmission. The promise of the bank is to pay to the bearer. Whoever is, for the time being, the bearer, is the direct contractor with the bank, and may maintain his suit against it upon the original promise running to himself. He is no more affected with the legal rights or liabilities of an assignee than he would have been had the issue of the bill by the bank been made directly to him in the first place.[2] He does not therefore succeed to a pre-existing right of action against the bank which he can use as a set-off in a pre-existing suit of the bank against himself. But he comes into possession of an original right

501. Two cases in Georgia, Griffin *v.* Central Bank, 3 Kelly, 371, and Collins *v.* Central Bank, 1 id. 435, in allotting the assets of an insolvent bank, declared that the claims of the bill-holders should be estimated only at the amount actually paid by them respectively for the bills, on the ground that it would be grossly inequitable for the bill-holders, who had paid only ten cents on the dollar for their bills, to be allowed to exhaust the entire fund which was coming to the creditors, to the exclusion of persons who had given cent per cent in labor or property. Bill-holders of course could only "exhaust the fund to the exclusion of others" when they were entitled to priority of payment. In such cases the effect seems certainly grossly inequitable, as the court thought it. But it is obviously a matter to be dealt with by the legislature. The judge cited no authority in his opinion, and the law is certainly as laid down in the text.

[1] § 640. Jefferson County Bank *v.* Chapman, 19 Johns. 322; Carpenter *v.* Butterfield, 3 Johns. Cas. 145; Dickson *v.* Evans, 6 T. R. 57.

[2] Bullard *v.* Bell, 1 Mason, 243.

of action which he cannot set off in a suit already pending at the time when he acquires it. Also it has been questioned whether, if the claim is only nominally that of the bank, and is in fact prosecuted for the benefit of an independent third party, the set-off of bank bills would be allowed.[3] It is clear that on principle there should be no set-off in such case, for the claims do not run between the same funds.

§ 641. **When the Bank is insolvent** (§ 637), the bill-holder can set off the amount of bills held by him for their full nominal or face value, provided he had come into possession of them prior to the insolvency.[1] It has been said, that, if any legislation exists providing for equality in the payment of bill-holders, this right of set-off is in derogation of it. But nevertheless the right is not taken away or diminished by reason of this clashing or inconsistency, which only furnishes an additional reason for the stringent enforcement of the rule requiring the possession to have been acquired prior to the insolvency.[2]

(*a*) Although the general rule is that the assignees of a bank are not obliged to take the notes of the bank, obtained after notice of the assignment, in set-off, yet such obligation may arise as a condition of the assignment, backed by statute.[3] In Maryland, in a case where, previous to executing the deed of trust, the board of directors voted that the debtors of the bank "should have the privilege of paying their debts in notes of this bank," and there was a statute providing for the payment of debts to the bank by its bills, whether solvent or not, whether obtained before or after assignment, it was held that the assignee must receive the

Bills received at par, though obtained after insolvency.

[3] Hallowell & Augusta Bank *v.* Howard, 13 Mass. 235.

[1] § 641. Miller *v.* Receiver of the Franklin Bank, 1 Paige, 444; Bruyn *v.* Receiver, 9 Cow. 413, n.; Haxtun *v.* Bishop, 3 Wend. 13; Diven *v.* Phelps, 34 Barb. 224; American Bank *v.* Wall, 56 Me. 167; Beers *v.* Maynard, 1 Bail. Eq. 168. *Contra*, Eastern Bank *v.* Capron, 22 Conn. 639; Savings Bank *v.* Bates, 8 Conn. 505.

[2] Clarke *v.* Hawkins, 5 R. I. 219.

[3] Exchange Bank *v.* Farmers' Bank, 19 Grat. 738, p. 754; Diven *v.* Phelps, 54 Barb. 224; Pancoast *v.* Ruffin, 1 Ohio St. 381; Honsum *v.* Rogers, 40 Pa. St. 190.

notes of the bank without reference to the time at which they were acquired.[4]

(*b*) Some questions may arise as to when the taker or purchaser of the bills is to be affected with knowledge of the bank's insolvency. No precise and definite rule has been laid down concerning this matter. The relationship existing between the individual and the bank might not unreasonably have some bearing and effect in the determination of the point in any particular case. Thus, a director obtaining bills of the bank at a discount, at a time when he himself is indebted to the bank, and also when by reason of his office he knows or ought to know that the bank is thoroughly insolvent, might well be refused the privilege of using these bills in set-off against such indebtedness; though an outsider, having no such knowledge, and obtaining bills at the same time also at a discount, but in due course of business, might be allowed to do so.[5] The director could hardly be fairly deemed a *bona fide* holder, for this purpose. In an early case in New York, it was declared that the mere refusal of the bank to pay specie, and the consequent stoppage of its bills, were not alone sufficient proof of insolvency to deprive a subsequent *bona fide* holder of its bills of his right to set them off. The court based their decision upon the view that these facts did not alone indicate a suspension of the banking business and an absolute deficiency of assets to meet the liabilities of the corporation, but might very probably be the result of mere temporary embarrassment and want of available funds growing out of the financial condition of the country.[6] In a later case in the same State, where it appeared that the bank had closed its doors, and had for all practical purposes suspended business altogether, it was held that the taker of its bills after these occurrences could not use them in set-off.[7]

Holder's knowledge of bank's insolvency.

There seems to be that degree of sound argument in both these cases that it is hard to say that either of them is wrongly

[4] Union Bank *v.* Ellicott, 6 Gill & Johns. 363.
[5] Clarke *v.* Hawkins, 5 R. I. 219.
[6] Jefferson County Bank *v.* Chapman, 19 Johns. 322.
[7] Diven *v.* Phelps, 34 Barb. 224.

decided. At the same time, they are open to the objection that it is difficult to draw from them any general principle which shall be of universal and satisfactory operation. Many instances must arise in which it will be very hard to say whether or not the suspension of the bank is sufficiently complete to amount to notice of insolvency in fact. Further, the person who takes the bills may not know precisely what is the extent, or what are the circumstances, of the suspension. In short, the test which, if any, can alone be drawn from these rulings, is one which is open to many practical objections. We shall therefore take the liberty to suggest what seems to us a better one. Though it has not been supported by judicial adoption, yet at least it has the negative merit of having never been passed upon by way of rejection in any cause, so far as we have discovered. It is therefore to be fairly considered as open in the future either to acceptance or rejection. It is simply this, that so long as the bills continue to be taken and paid away by the community in general, like the bills of other banks, that is to say, so long as they continue in actual circulation *as money*, so long any person taking them as money should retain the right to set them off against the bank. When they no longer circulate *as money*, having a fixed value, but can only be passed by way of barter or exchange, becoming the subject in each case of a special bargain as concerns the valuation at which they shall be received, then it is time to say that the taker can no longer set them off for their full face value. *The manner in which they are treated by people generally*, and *the manner in which any individual actually comes by them*, are the two elements of determination. When they lose their traits as money, then usage no longer makes it unusual or apparently unreasonable on the part of any man to refuse to accept them as such. At this stage, and not before, it would seem to be time to deprive the subsequent taker of the privilege of securing to himself a considerable advantage over other debtors through the medium of a right of set-off. Of course, if actual knowledge of the insolvency of the bank could be shown, the holder should not be allowed to benefit

Proposed test.

by subsequently buying up the bills of the bank; but the test proposed may be regarded as drawing the proper line for *presuming* knowledge on the part of a taker of the bills. This rule, advanced by Mr. Morse, is approved in 2 Daniel on Negotiable Instruments, § 1690.

§ 642. **Note payable in Bank Bills.** — Where the bank is the holder of a note, which is, in terms, made payable in its own bills, if it sues thereon it shall recover for the full face value of the note, without regard to the merchantable value. For even after the issue of execution, the debtor can discharge the debt by a payment or tender of the bills of the bank.[1] A promise to pay a certain amount "in current bank money" is an obligation to pay "current bank bills calling on their face for" that amount, "in the same way as where one promises to pay" a certain named sum "in currency, the meaning is to pay current notes calling on their face for" that amount, "as distinguished from" that amount "in United States coin, or, as it is termed, 'in good money.'"[2]

§ 643. **Statute of Limitations.** — A bank note is not subject to the running of the Statute of Limitations, as any other simple indebtedness or promise to pay would be, although the bill is not distinguishable in form from such a promise. Its purpose of circulation necessarily involves this result. Every time that it is reissued by the bank the promise is renewed, and it must usually be impossible, in the case of any particular bill, to say how often it has passed into the bank, and again has been paid out by it, or when it was last so paid out. But even if in any individual case it could be shown that the last issue was at a time so long past that the period of the statute has since elapsed, yet another objection, which goes to the root of the matter, still remains behind. For lapse of time, in the case of these instruments, affords no presumption of their having been paid. On the contrary, their existence in other hands than those of the bank is at least *prima facie* evidence of nonpayment, since they are never paid, and generally speaking payment can never be enforced upon them at

[1] § 642. Abbott *v.* Agricultural Bank, 11 Sm. & Mar 405.

[2] Lackey *v.* Miller, Phill. (N. C.) L. 26.

law, unless they are surrendered to the promisor.[1] Further, as already shown, a new contract and a new cause of action are created by each transfer, so that it might be argued that the statute could begin to run only from the time when the last holder came into possession.

If the bills cease to circulate, the statute runs.

When a bank has suspended payment and its bills have ceased to circulate as money, the Statute of Limitations applies to them as to other contracts.[2] If bills have ceased to be taken in and reissued by the bank, they have lost the characteristic which exempts them from the statute.[3] And where a bank openly and notoriously ceased trading and banking in 1865, and its bills ceased to circulate and it issued no more bills, but confined itself to realizing assets and redeeming bills, and surrendered its charter in 1877, holders of bills should have brought suit before 1870, wherefore stockholders sued in 1878 could interpose the Statute of Limitations of 1869.[4] But the Tennessee Code, § 2779, — excepting from the six years' limitation all notes "issued or put in circulation as money," — applies to notes issued by banking corporations under the laws of Tennessee, whether the notes have ceased to circulate as money or not, or whether the bank has or has not ceased to exist as a corporation.[5]

§ 644. **Presentment and Demand.** — If a bank-note is made payable generally, suit may be brought upon it without prior demand. Where bills are made payable at any particular place, as at the banking-house of the corporation, the rule is still somewhat doubtful. It has been held in Georgia, that demand at that place must be averred and proved.[1] In other decisions it has been asserted that the suit may still be sustained, even though no demand has been made; but that if the bank brings the money into court and shows its ability

[1] § 643. Hinsdale *v.* Larned, 16 Mass. 70; Rev. Stat. c. 120, § 4.
[2] Samples *v.* Bank, 1 Woods, 523 (1873).
[3] Kimbo *v.* Bank of Fulton, 49 Ga. 419.
[4] Johnson *v.* Tulley, 60 Ga. 540 (1878).
[5] State *v.* Bank of Tennessee, 5 Baxt. 101 (1875).
[1] § 644. Dougherty *v.* Western Bank, 13 Ga. 287.

and willingness to have paid, had presentment been made at the place named, then it shall lose neither interest nor costs.[2] If demand be necessary at all, it must be made at the place designated upon the face of the instrument. Even if that place be other than the corporate banking-house, the rule is unaffected by this fact, and demand at the banking-house cannot be substituted for demand at the place named.[3] The course has often been adopted of requiring, through statutes, that banks putting bills in circulation shall deposit with some public officer bonds or stocks as security for the ultimate redemption of these bills. The same legislation also usually designates the manner in which these securities may, upon occasion, be resorted to, usually through the medium of the same State official who receives them. But provisions of this description have no effect upon the right of the bill-holder to sue the bank directly, unless some restriction is expressly imposed in terms in the law itself. The legislative security is not given instead of, but in addition to, the holder's private right of action. It is collateral to that right, and cumulative; but does not supersede it. Neither is the bill-holder's right to sue for any balance remaining due to him infringed by the fact that he has received as large a dividend upon his claim as the State officer is able to pay from the securities deposited. He is entitled to payment in full. In his suit to recover the unsatisfied balance, he will be held simply to show how much he has already had paid to him from the official source, and will not have to go into the matter of the sufficiency or correctness of the official's proceedings. Nor will he be in any way affected by the assertion or proof of their insufficiency or incorrectness.[4]

[2] State Bank *v.* Van Horn, 1 South. 382; Haxtun *v.* Bishop, 3 Wend. 13; Bryant *v.* Damariscotta Bank, 18 Me. 240; Bank of Niagara *v.* McCracken, 18 Johns. 495, where the individual opinion of the judge (Woodworth) was thus stated, but no decision by the court was either needed or given. See Jefferson County Bank *v.* Chapman, 19 id. 324; Bank of Kentucky *v.* Hickey, 4 Litt. 225.

[3] King *v.* Dedham Bank, 15 Mass. 447; Ware *v.* Street, 2 Head, 609.

[4] Conwell *v.* Hill, 14 Ind. 131.

§ 645. **Demand advisable in Case of Insolvency.** — If the bank becomes insolvent, it is well to make a demand. For where interest upon claims on bank-notes is allowed at all, the current of authority seems to be in favor of the rule of calculating it only from the time of the demand, and not from the date of the suspension, or of the commencement of proceedings in insolvency. There seems no sound reason for making a distinction in this doctrine by reason of the fact that the bills are or are not made payable at any particular place. If no place is named, the assumption must be that payment will be made at the banking-house. It is natural for the holder to demand payment there; and therefore, if demand would otherwise be necessary in order to make the interest begin to run, it ought also to be necessary, though the bill is not in terms made payable at any especial place. The date of the bill has nothing whatsoever to do with the matter; it can never, simply as such, be taken as the starting-point in the reckoning of interest.[1] Indeed, the date of a bank bill is a matter of very little moment. As has been seen, it does not afford a basis for the calculation under the Statute of Limitations; and evidence may at any time be introduced to show that it was not in fact executed or issued by the bank until long after its nominal date.[2] Where a statute gave damages in case of failure of the bank to redeem its bills on demand, at the rate of ten per cent per annum, so long as the suspension should continue, it was held that these damages might be recovered in addition to the ordinary six per cent, which would be recoverable as of course from the time of the demand.[3]

§ 646. **Redemption.** — There is no necessity for a separate presentment and demand upon each separate bill. The pre-

[1] § 645. Ringo *v.* Trustees of Real Estate Bank, 8 Eng. 563; Bank Commissioners *v.* Lafayette Bank, 4 Edw. Ch. 287. But in Ohio interest has been allowed from the date of suspension of specie payment. Atwood *v.* Bank of Chillicothe, 10 Ohio, 526. Interest runs from demand, not from date. Bank of Kentucky *v.* Thornsberry, 5 B. Mon. 519.

[2] Selfridge *v.* Northampton Bank, 8 Watts & S. 320.

[3] Wendell *v.* Washington & Warren Bank, 5 Cow. 161; People *v.* Same, 6 id. 211.

sentment of a package is perfectly proper.[1] But for the purpose of determining in what description of coin, and in how many pieces of each respective denomination, payment may be legally tendered by the bank, it has a right to treat each bill as a distinct demand.[2] An artifice, which is often resorted to by banks when short of funds, is to delay payment upon the bills presented as much as possible by the exercise of every method of exhausting time which the ingenuity of the officers can invent. The employment of only a single official, the inspection by him with affected accuracy and minuteness of each individual bill presented, the slow counting out by him of the smallest coins in which payment can be legally made, are all familiar devices by which banks hard pressed not unfrequently seek relief. Such proceedings have been uniformly and resolutely condemned by the courts. The duty and undertaking of the bank is not alone to redeem its bills, but to redeem them with reasonable despatch; and intentional dilatoriness is a clear breach of the obligation. What is reasonable despatch is a point which is of course incapable of accurate abstract definition. No precise number of officers can be declared to be necessary, and no precise number of minutes or seconds can be arbitrarily allotted as proper for the payment of a certain number of bills. The bank is entitled to an opportunity to satisfy itself of the genuineness of the bills before it pays them. But unless some peculiar circumstances give rise to unusual suspicions, it is expected to be able to do this with considerable expedition. In each particular case the court will look at all the circumstances, and will infer from them the *animus* of the bank. If the design appears to have been evasive, and an effort on the part of the bank to create delay simply as such, and in order to secure its own selfish advantage, then, though the officers have scrupulously observed the technical requirements of the law, though they have never refused redemption, but have maintained a steady

Artifices for delay condemned.

Bank must pay with reasonable despatch.

Spirit of the law and intent of the bank governs.

[1] § 646. Reapers' Bank *v.* Willard, 24 Ill. 433.

[2] Boatman's Savings Institution *v.* Bank of Missouri, 33 Mo. 497.

payment, they will not be absolved from the just result of their really unfair conduct. The non-infringement of the letter of the law will not cover the real infringement of its spirit. The proceedings will be regarded as tantamount to a deliberate refusal in terms on the part of the corporation to redeem its circulation on demand. Though the officers may have carefully reiterated their intention to redeem, yet the testimony of facts will outweigh that of words. But if the *bona fide* intent was apparent to redeem the bills with sufficient rapidity, and according to the usual course of banks in this department, then the bank could be held only upon the ground of a culpable deficieney in its arrangements and facilities, amounting to, and for which it would be liable as, gross negligence.[3]

§ 647. **The Banking Hour Limit must not be unreasonably used.** — As a general rule, banks are entitled to the benefit of the limitation of bank hours. It is absolutely necessary that they should have some of the afternoon hours free from the interruptions, and even more from the constant changes in their accounts and money matters, unavoidably produced by the transactions of business. But an effort to take advantage of bank hours which is clearly evasive of a reasonable duty, will not be protected. Thus, if a parcel of bills be presented just before the close of bank hours for redemption, a refusal to redeem simply because the transaction could not be wholly completed before the hour would be unjustifiable; but if it would necessitate the trespassing to a substantial and really inconvenient extent into the afternoon period of office labor, then the refusal would be proper. The criterion of reasonableness will be applied in all such cases, and only within its protection will the rule of banking hours be recognized and respected.[1]

§ 648. **Payment of Lost or Destroyed Bank Notes.** — Ordinarily payment upon a bank bill or note is conditional upon its

[3] Suffolk Bank *v.* Lincoln Bank, 3 Mason, 1; Reapers' Bank *v.* Willard, 24 Ill. 433; People *v.* State Treasurer, 4 Mich. 27.

[1] § 647. Suffolk Bank *v.* Lincoln Bank, 3 Mason, 1; People *v.* State Treasurer, 24 Ill. 433.

surrender. Four classes of cases have arisen in which payment has been sought to be enforced without an offer of surrender; viz. where there has been (1) destruction of the whole bill; (2) loss of the whole bill; (3) destruction of a part of the bill; and (4) loss of a part of the bill.

1. **Destruction of the Whole Bill.** — The least difficulty is encountered in laying down the rule in this case. It cannot be questioned that, if the total and absolute destruction of the bills can be shown, the last holder or owner of them, he who was entitled to demand payment upon them at the time of the destruction, can recover from the bank; not of course upon the instruments themselves, which must be offered for surrender as preliminary to collection upon them, but upon the original promise of the bank of which they were the documentary evidence. This rule is perfectly established, and the difficulty arising in cases of destruction does not grow out of any doubtfulness concerning it, but out of the stringent rules which are applied to the sufficiency of the evidence offered by the plaintiff. It is obvious that the bank must always labor under extreme disadvantages in suits of this character, and the courts have made it their task to surround the bank with such substantial protection as the nature of the case permits. (1) It is probable that in the great bulk of such cases the bank would be without *any possible means of disproving either the plaintiff's possession, or the alleged destruction of the bills, even though the entire story were false.* Beyond the testimony to these points, therefore, he is further held to considerable accuracy in the secondary evidence, descriptive of the bills and notes asserted to have been destroyed. Proof of destruction of bills and notes is not enough; it must be proof of the destruction of *specific* bills and notes, and this can be accomplished only by means of a description of each one of them. Evidence adduced by the plaintiff, and naturally uncontroverted by the bank, that he had lost in a fire a parcel of the circulating bills of the bank amounting in all to a certain sum, is insufficient; for it would not serve as an identification of the bills, nor enable the bank to protect itself against them

Last owner may recover, but to protect bank he is required to prove clearly the destruction of *specific* bills, and to give bond.

should the destruction at any time afterward appear not to have been accomplished. *The same impossibility of identifying the bills would render it also impossible to give to the bank any sufficient bond of indemnity against reappearance.* For no particular bills could be described in such a bond. (2) It was well observed in the Massachusetts case cited below,[1] that "*the defendants have not contracted to redeem their bills, except upon their production and delivery; and it is the negligence or misfortune of the plaintiff that they cannot be produced. The plaintiff is then bound to furnish an equivalent; to put the defendants in as good a position as if the bills were produced.* If he cannot do this, he has no right to shift the consequences of the loss upon a party in no wise answerable for it. . . . Upon the whole matter, the court are of opinion that to permit a plaintiff to recover . . . upon bills circulating as currency and available to any one taking them *bona fide*, without such means of distinguishing the particular bills as would admit of an adequate indemnity, would open a wide door to fraud, would be incompatible with the reasonable security and rights of the defendants, and is not required by law." The whole opinion in this cause, delivered by Judge Hoar, is very satisfactory and conclusive. It will be observed, however, that the doctrine first laid down in this paragraph is not at all impeached by this or any other of the cases cited, the result of all which is to be referred wholly to the fact that in them all the respective plaintiffs were unable to identify the destroyed bills. Had they been able to do so, by describing the mark of the issue and the numbers of the bills, so that they could have executed a sufficient bond of indemnity against their future reappearance, they could have recovered upon them, and possibly even without being held to give such a bond, which is in none of these cases asserted to be indispensable,[1] and in that cited from the Alabama Reports is

[1] § 648. Tower *v.* Appleton Bank, 3 Allen, 387; Burridge *v.* Geauga Bank, Wright (Ohio), 688; Bank of Mobile *v.* Meagher, 33 Ala. 622; Bank of Louisville *v.* Summers, 14 B. Monr. 306; Hagerstown Bank *v.* Adams Express Co., 45 Pa. St. 419; Hinsdale *v.* Bank of Orange, 6 Wend. 378.

distinctly stated to be needless. The theory of the law would not require it. The right to recover on the original indebtedness ought to be perfect upon satisfactory proof of destruction. *The requirement of a bond would seem to be matter of equity rather than law.* Yet so just and reasonable does it seem, that the courts of law are sometimes willing to enforce it. The description, whether by number and mark of issue, or other means of identification, is mere matter of proof upon the trial. It need not be set forth in the pleadings; and a declaration describing only a certain number of the notes or bills of a certain bank, and of a certain denomination, is sufficient.[2]

§ 649. 2. **Loss of the Whole Bill.** — In this case it cannot be doubted that the loser could have no right to demand payment of the original debt from the bank. It may See below, § 649 A. be properly considered that so long as the bill in a perfect condition, that is to say not materially mutilated, continues to exist, the original debt is inseparable from it. It is only after it has been destroyed, either wholly or to such an extent that it has lost its negotiability, that the right to sue upon the original indebtedness accrues. For bank notes notoriously pass by delivery. Any person who takes them *bona fide* for value has a claim against the bank for their amount, which is unaffected by any previous circumstance in the chain of title. This being the case, therefore, it is clear that the bank may be called upon to pay twice over if it can be held to pay both the loser and a subsequent *bona fide* holder. *There is no reason why the bank should be subjected to a gross and obvious injustice simply to relieve the loser from a hardship or misfortune. Neither is it possible to give a satisfactory bond of indemnity.* Even supposing, which could rarely happen, that the loser could so accurately describe the bills that they could be identified and distinguished from all others of the same issue, still the bank would be obliged to pay them to any *bona fide* holder who presented them, and it is not likely that they would be presented at the counter for redemption by any other party. The thief or the finder would

[2] Carey *v.* Greene, 7 Ga. 79.

hardly resort to this means of securing the profit of his booty. Even if it could be supposed that he would do so, still it would be imposing upon the bank an onerous duty, growing out of no negligence or misconduct on its own part, to require it to watch for and detect the wrong-doers. Adjudicated cases support this view.[1] But there has been very little discussion of the subject, rather, one would think, because it was so plain that it left no room for doubt than from any deficiency in opportunity or temptation to institute such suits. Yet, strange to say, one State has adorned its judicial annals with decisions to the contrary effect.[2] However amusing may be the rhetoric of the court in the earlier of the two causes cited, it is impossible to pretend that they are entitled to be deemed legal authorities. To support this criticism it is needful only to give in the judge's own language the consideration upon which he was content to base his ruling: "It would be difficult for any ingenuity to designate a happy casualty by which he (the owner) could flatter himself with the hope of his having them restored." We are constrained to doubt the conclusiveness of this gracefully phrased argument. Some stress is laid in this case upon the fact that the plaintiff and loser had published, apparently in the newspapers, notice of his loss and of his claim to the bills. The legal effect of such publication has never been judicially declared. But it cannot be conceived that any practical advantage would be likely to accrue from it. No court would of course regard it as constructive notice to any particular member of the community;[3] and to bring home to him actual knowledge by showing that he had read the notice, and that he knew or ought to have known from it that at the time he took the bills they were

[1] § 619. Hinsdale *v.* Bank of Orange, 6 Wend. 378; Martin *v.* Bank of United States, 4 Wash. C. C. 253; Solomons *v.* Bank of England, 13 East, 135, n.; Raphael *v.* Bank of England, 17 C. B. 161.

[2] Waters *v.* Bank of Georgia, R. M. Charlt. 193; Robinson *v.* Bank of Darien, 18 Ga. 65. This case adds the important proviso that suitable indemnity must be tendered by the plaintiff. As we have taken pains to show in the text, a really efficient indemnity may be regarded as a practical impossibility. See, however, § 619 A.

[3] Bank of United States *v.* Sill, 5 Conn. 106.

the identical ones therein described, would require such a rare combination of lucky circumstances as it is quite inconceivable should ever occur. Notice of the loss of a certain number of bills of a certain denomination issued by a certain bank would of course be utterly meaningless. No individual bills would be described thereby, and the circulation of the entire issue could not be stayed because an individual had met with a loss.

In case of the loss of a negotiable promissory note, the holder may recover, but equity will compel him to give a bond of indemnity.[4] And the same rule is held as to bank notes in Georgia, as noted above.[5] The tone of the court in Massachusetts[6] is not at all against recovery in case of loss, this word being used continually in connection with destruction, — "loss or destruction"; but the numbers must be provable, so that a bond can be given. "Suppose several parties should sue on bills alleged to have been destroyed, and should recover, each giving bond. If it should afterward appear that all the bills had not been destroyed, upon which bond would the defendants have a remedy?" And the language of the court in California is the same, a bond must be given in case of the "loss or destruction" of a certificate of deposit, each certificate being held negotiable.[7] If the paper comes to the hands of a *bona fide* holder, and the obligor and his sureties are insolvent, it is a great hardship on the bank. But the hardship does not attach alone to the case of loss, there is only a difference of degree; the bank may be subjected to expensive and protracted litigation when a bill supposed to have been destroyed turns up, or is claimed to have turned up, as well as in the case of one lost, and against all such burdens the bank should be protected, and in any case the bond may prove worthless when

[4] Davies *v.* Dodd, 1 Wils. Ex. 110; Macartney *v.* Graham, 2 Sim. 285; Story Eq. Jur., §§ 85, 86; Wade *v.* New Orleans Canal, &c. Co., 8 Rob. (La.) 140.

[5] Waters *v.* Bank of Georgia, R. M. Charlt. 193; Robinson *v.* Bank of Darien, 18 Ga. 65.

[6] Tower *v.* Appleton Bank, 3 Allen, 387.

[7] Welton *v.* Adams, 4 Cal. 37.

the time to test it comes. There is more likelihood of this in case of a mere loss. The plaintiff on the face of this case fails to prove that he is the true creditor, for the bill may have come already to the hands of a *bona fide* holder; as to him the plaintiff is not entitled, but as to the bank the money does belong to the plaintiff, and if the bank can be properly guarded from danger the plaintiff should recover.

It seems to us that this might be done by depositing bonds of the United States with the bank sufficient to cover the amount. The bank to keep them as security, but the interest to go to the plaintiff. The bank is not entitled to retain the principal as its own, and use it; it is only entitled to be secure against future demands.

§ 649 A. **Proposed Solution of the Problem of Lost Bills.** — The opinion of Messrs. Morse and Daniels in this matter of loss of the whole bill does not commend itself to us. As between the bank and the owner of the bill at the time of loss, the money belongs to the latter. If it is paid over to the owner, however, the bank will be endangered; while if it is retained by the bank, and the bill is really lost and never turns up, the bank has gained the use of money to which it had no right.

There is a practical method of securing the bank and at the same time giving the owner the use of his money, viz. to order the bank to pay the amount of the lost bills to the owner upon receiving a deposit of stock or Government bonds sufficient to cover the risk of a second payment, such security to be held by the bank until the statute of limitations has barred any possible claim upon the missing paper, but the income from the collateral to belong to the depositor. This method would secure the rights of both parties satisfactorily, even if an ordinary bond of indemnity is considered insufficient, the risk being greater than in case of a bill claimed to be destroyed.

§ 649 B. **When Indemnity is not necessary.** — It has been held that no indemnity shall be required when a lost bill or note has been traced to the defendant,[1] because then it could not become the property of a *bona fide* holder without default of

[1] § 649 B. Murray *v.* Burling, 10 Johns. 172; Smith *v.* McClure, 5 East, 476; Buck *v.* Kent, 3 Vt. 99.

the defendant; or when the instrument was never negotiable;[2] or was restrictively indorsed before loss; or was payable to order and not indorsed;[3] or when the instrument is shown to have been destroyed;[4] or when the debt at the time of the suit would be barred by the Statute of Limitations;[5] for in none of these cases can harm come to the defendant.

This would be true if the facts are in reality what the jury consider them, and if such state of things be *admitted* by the defendant, it is just to hold him to pay without indemnity; but if there be any dispute, no matter how clear the evidence *seems*, we think indemnity should be given,[6] for human conclusions, even those of a jury, are strangely subject to error, and the paper may after all reappear in the hands of a *bona fide* holder for value without notice, who can claim payment again from the maker or indorser. For example, though it be proved beyond shadow of doubt that a bill has been destroyed, the possibility remains that it may have been *negotiated before destruction*.

§ 650. 3, 4. **Destruction of a Part of the Bill; Loss of a Part of the Bill.** — These two points may be considered together, for both rest upon the same general principle. That principle is, that a *piece or fraction only of a bank-bill is non-negotiable*. Negotiability is an attribute of the bill as a whole. When it has been severed into parts, this quality pertains to no one of them. They are not even payable *pro tanto*, according to the ratio of the size of the part to the whole. Any person who takes a piece takes it subject to all the equities which

The true owner of the whole bill may recover upon giving bond.

The severance of the bill destroys its negotiability.

[2] Wright *v.* Wright, 54 N. Y. 437; Clark *v.* Reed, 12 Sm. & Mar. 554; Lazell *v.* Lazell, 12 Vt. 443; Crowe *v.* Clay, 9 Exch. 604.

[3] Hopkins *v.* Adams, 20 Vt. 407; Moore *v.* Fall, 42 Me. 450; Lazell *v.* Lazell, 12 Vt. 443; Branch Bank *v.* Tillman, 12 Ala. 214; Depew *v.* Wheelan, 6 Blackf. 485; Price *v.* Dunlap, 5 Cal. 483.

[4] Bank of United States *v.* Sill, 5 Conn. 106; Hinsdale *v.* Bank of Orange, 6 Wend. 378; Patton *v.* State Bank, 2 Nott & McC. 464; Scott *v.* Meeker, 20 Hun, 163.

[5] Torrey *v.* Foss, 40 Me. 74; Moore *v.* Fall, 42 Me. 450.

[6] Price *v.* Dunlap, 5 Cal. 583; Welton *v.* Adams, 4 Cal. 37; Wade *v.* N. Orleans, &c., 8 Rob. (La.) 140; 2 Parsons, Notes and Bills, 304.

burdened it in the hands of the party transferring it. It makes no difference whether or not value has been parted with by the holder in exchange for it. It must be traced back through the series of intermediate holders until it is brought into the hands of the first person who received it in its fractional condition. If he came by it dishonestly, or if he found it and so parted with no value in exchange for it, then this imperfection in his title adheres to it throughout its entire subsequent career, and no recovery can be had upon it. Hence it is obvious that the bank can never be held to pay more than once upon one bill. Only the original owner who was entitled to the whole bill could show a good title, and he only could recover. There seems therefore to be no sound reason why any person presenting *a fragment of a bill, and proving conclusively his ownership of the whole bill could the remainder of it be produced, should not be allowed to recover its full amount.* For there can be *no other true owner of the entire bill, and no one who cannot prove himself such can ever recover.* But claims of this description would seem to furnish peculiarly proper opportunity for demanding that indemnity [1] be given to the bank, and it will be seen on examination of the cases cited below that it is generally expected. The ob-

[1] § 650. Story holds that a bond of indemnity should be given to secure the bank against loss by the appearance and setting up of the other part of the bill. Story on Bills, § 448. But Professor Parsons thinks that no bond should be required, for if the holder of the missing half sues on it, the bank can plead in bar its payment in the former action. 2 Parsons, Notes and Bills, 313. If a plea of payment on the first half were always good in bar, this rule would come near to justice. But courts are liable to make mistakes, and if the holder of the second half could show that he was really the owner, and not the one to whom the bank had paid, the former judgment would not conclude him who was not privy to it. Especially if the holder of the first half was now insolvent, and the holder of the second part could not recover from him, would he have a just claim against the bank. If he could prove that the former judgment was wrong, the bank would be liable to him; and at any rate the costs the bank could recover in the second suit, if decided in its favor, would not cover its expenses. This burden and risk, we think, should be borne by the one who asks the bank to pay on part of a bill, and a bond should be required.

stacle of difficulty in identification no longer exists; and cases can easily be conceived in which it might appear, after the bank had made the payment, that an imposition had been successfully practised. The proper *privilege of the bank is to require surrender of the whole bill before paying it, and if this privilege is taken away in any peculiar case, every safeguard against conceivable injury in consequence should be given in its stead.* We have stated the doctrine as it seems to us, and as it is laid down by many respectable authorities.[2] Especially conclusive is the reasoning of Judge Marcy in Hinsdale *v.* Bank of Orange. Lord Ellenborough had expressed the opinion that the rightful owner of the whole bill, holding a half only, could not maintain his action, because the other half might come into the hands of a *bona fide* holder who could sue; and so two recoveries might be had.[3] But, says Judge Marcy, this implies the negotiability of the second half. If it is non-negotiable, of course it can never come into the hands of a *bona fide* holder, and Lord Ellenborough's supposed difficulty can never arise; that it is non-negotiable "is as clear to my mind as the proposition is certain that a part is not equal to the whole." Certainly the impression in the community is so general to the same effect, that it would be difficult to imagine that any person could in real honesty and good faith receive a half of a bank bill as money. To the same effect, and very excellently put, is the decision cited from 4 Washington's Circuit Court Reports.

Lord Ellenborough *contra.*

(*a*) Mutilation of bank bills will not affect a holder's right to recover, if enough remains to identify them as genuine bills, actually issued by the bank. Even erasure or change of the numbers will have no effect, as the numbers of a negotiable or other instrument in a series is

Mutilation. Change of number.

[2] Hinsdale *v.* Bank of Orange, 6 Wend. 378; State Bank *v.* Aersten, 3 Seam. 135; Commercial Bank *v.* Benedict, 18 B. Monr. 307; Northern Bank *v.* Farmers' Bank, id. 506; Patton *v.* State Bank, 2 N. & M. 464; Armat *v.* Union Bank, id. 471, n.; Bank of United States *v.* Sill, 5 Conn. 106; Bullet *v.* Bank of Pennsylvania, 2 Wash. C. C. 172; Martin *v.* Bank of the United States, 4 id. 253; Bank of Virginia *v.* Ward, 6 Munf. 166; Farmers' Bank *v.* Reynolds, 4 Rand. 186.

[3] Mayor *v.* Johnson, 3 Camp. 324.

not a material part of it. The number only serves to identify, and if it can be otherwise identified it is sufficient.[4]

§ 651. The custom of severing bank bills in order to send them more safely by mail has been so common, that cases where one half was either lost or destroyed have been of frequent occurrence; and were it not for the ruling of Lord Ellenborough there would be no break in the uniform maintenance of the doctrine above laid down. As it is, a comparison of the reasoning upon the one side and the other is clearly in its favor, and the authorities which support it are so abundant that it ought not to be any longer open to question. If it is correct, it follows that it makes no difference whether the missing half has been utterly destroyed or only lost. The effect of the two facts upon the right of the lawful owner to recover is precisely the same. But if the contrary doctrine, as asserted by Lord Ellenborough, is to be sustained, then a material distinction will be established between the two classes of cases. Upon proof of utter destruction of all parts of the bill save that presented for redemption, the holder of that part must be allowed to recover, if not upon it, yet upon the original indebtedness. Clearly the analogy of the case of destruction of the whole must govern. But if only a loss of the other parts be proved, then the holder of the part presented can recover only in the same way, and for precisely the same reasons, as if he had lost the whole bill. The theory then adopted is, that the other part or parts are as negotiable as the whole, and of course the same rule applies to both cases. The holder of a part is never entitled to a proportionate payment. The indebtedness is indivisible. Some one person is entitled to the whole, and no other person can be entitled to anything less.[1]

Effect of Lord Ellenborough's rule.

An effort has sometimes been made by banks to save themselves altogether from the necessity of ever paying upon any portion less than the whole of a bill, by publishing the state-

[4] Note-holders of Bank of Tennessee *v.* Funding Board, 16 Lea, 46; Birdsall *v.* Russell, 29 N. Y. 220; Commonwealth *v.* Savings Bank, 98 Mass. 12; City of Elizabeth *v.* Force, 29 N. J. Eq. 591.

[1] § 651. Farmers' Bank *v.* Reynolds, 4 Rand. 186.

ment that they will not hold themselves liable upon severed bills, and by otherwise using such means as are in their power to notify the community generally of this intention. But such attempts are utterly impotent towards effecting the desired immunity. The bank is simply a party to the contract to which the rightful owner is the other party. Neither can, by a simple proclamation of its wishes or intentions, injuriously affect the rights which the law gives to the other under the contract and as an essential part of it. The sole exception must lie in the express assent of the other party, and his consequent voluntary abandonment of his rights, which would have to be affirmatively shown. So improbable an inference as against the bill-holder will never be based solely upon the simple fact of the declarations made by the bank and published by it in the newspapers.[2] When the plaintiff in a suit upon a bank bill recovers, he is entitled only to the amount of the bill and interest thereon, (which, as above stated, must apparently be calculated from the time of his making an actual demand for redemption), and the ordinary costs of court. Incidental damages can never be allowed.[3] If several banking firms undertake to issue bills for circulation, stating that any one of the firms will redeem, the firms are severally liable upon every bill so issued which does not designate in terms by which firm it will be paid.[4]

Notice by bank that it will not pay part of a bill.

§ 652. **Title and Suits.** — It is familiar that the title in bank notes passes by mere delivery. It has also been seen that the receiver of bills has the position of an original promisee of the bank. He does not, as by an assignment, take only the title of the person paying them over to him. He need only receive them in the usual course of business for a full and fair consideration and in good faith. His title is then unimpeachable by any party, though they may have been put in circulation fraudulently, or may have been stolen from the

[2] Martin *v.* Bank of the United States, 4 Wash. C. C. 253, Bank of United States *v.* Sill, 5 Conn. 106.

[3] Bank of St. Mary's *v.* St. John, 25 Ala. 566.

[4] Taylor *v.* Cook, 14 Iowa, 501.

Possession is *prima facie* evidence of title.

bank or from a subsequent holder.[1] Hence it follows, as a rule of law, that possession is *prima facie* evidence of title. The holder may sue the bank and recover simply by virtue of such possession, unless the bank can show by positive proof that the possession was obtained *mala fide*.[2] The bank may *always safely pay the holder, and will discharge itself thereby, unless it knows, or has sufficient reason to know, that the possession was fraudulently come by*.[3] But the mere fact that the bills have passed through the hands of a *bona fide* owner since the theft or fraud does not wholly wipe out its effect. Such a holder cannot transmit a pure title to one receiving them from him with notice of the facts.[4]

It is held that bank-notes may be protested, and that one acquiring them after dishonor takes subject to equities whether he knew of the dishonor or not.[5]

§ 653. **Bills payable to Bearer.**— Bank bills are now usually made payable to bearer, though sometimes they are expressed to be payable to A. B. (naming some person who may be either real or fictitious) or bearer. The rights of the holder are not in any shape affected by the use of the latter form. Bills so written are, for all purposes, precisely the same as if they had been made simply payable to bearer. In a suit upon such a bill once instituted in one of the United States courts, it was argued that the person named might not have been competent to sue the defendants in those courts. The objec-

[1] § 652. Bay *v.* Coddington, 5 Johns. Ch. 54, and cases there cited; White *v.* How, 3 McLean, 111; Robinson *v.* Bank of Darien, 18 Ga. 65; Maury *v.* Ingraham, 28 Miss. 171. Also see especially Goldsmid *v.* Lewis County Bank, 12 Barb. 407.

[2] Worcester County Bank *v.* Dorchester, &c. Bank, 10 Cush. 488; Wyer *v.* Dorchester, &c. Bank, 11 Cush. 51; Crawford *v.* Royal Bank, Ross Lead. Cas. 229; Louisiana Bank *v.* Bank of United States, 9 Mart. 396. But in England this difference between the case of bank notes and other negotiable paper as to the burden of proof is not allowed; and if it is shown that the bills were stolen or lost, or obained by fraud, the holder must prove that he is a *bona fide* holder for value in the usual course of business. De la Chaumette *v.* Bank of England, 9 Barn. & Cr. 208.

[3] New Hope & Delaware Bridge Co. *v.* Perry, 11 Ill. 467.

[4] Olmstead *v.* Winstead Bank, 32 Conn. 278.

[5] Burroughs *v.* Bank of Charlotte, 70 N. C. 264.

tion was disposed of by the Supreme Court of the United States with the remark, "This court has uniformly held that a note payable to bearer is payable to anybody, and not affected by the disabilities of the nominal payee."[1]

§ 654. **Finding Bank Bills on Premises of another. — Bequest.** — A person picked up some bank notes on the floor of a shop and handed them to the shopkeeper, to hold them till the owner should come and claim them. The shopkeeper had no previous knowledge that the notes were on his floor. The shopkeeper caused abundant advertisement to be made, but the loser never appeared to reclaim his lost property. At the end of three years the finder tendered to the shopkeeper the expenses of advertising and an indemnity, and demanded the notes to be given to him. The shopkeeper refused. The finder brought trover against the shopkeeper, and was held to be entitled to recover the notes.[1]

Bank bills pass under a bequest of "money" or "cash."[2]

§ 655. **Bill-holders, their Rights and Privileges.** — It has been said, and with evident justice, that bill-holders ought to be entitled to protection in preference to other creditors of the bank. They are in fact the public: and though they are not legally obliged to receive bank bills in payment, yet custom and courtesy make it in most cases morally obligatory upon them to do so, such being the ordinary and universal course of dealing between man and man. They are not, like most of its other creditors, dealing with the bank with the expectation of mutual advantage. But obvious as is the propriety of affording a preferential protection to the community at large in the persons of those who may at any time happen to be the holders of bills of a failed bank, yet it is a matter which can only be accomplished

Not preferred at common law, but usually are by statute.

[1] § 653. Bank of the Commonwealth of Kentucky v. Wister, 2 Pet. 318; Bullard v. Bell, 1 Mason C. C. 243.

[1] § 654. Bridges v. Hawkesworth, 15 Jur. 1079. See New York, &c. Railroad Co. v. Haws, 56 N. Y. 175 (1874); Taneil v. Seaton, 28 Gratt. 601 (1877).

[2] Stuart v. Bute, 11 Ves. Jr. 662; Miller v. Race, 1 Burr. 457; Chapman v. Hart, 1 Ves. Sen. 271.

through the medium of legislation. In default of statutory provisions the law, as administered by judges, is impotent in the premises, and the bill-holders occupy a like position with all other classes of creditors.[1] Laws, however, have not unfrequently been passed for the purpose of correcting this evil; and the shareholders have been declared liable, to a greater or less extent, to contribution for the benefit of the owners of the circulating paper.[2] The litigation under such statutes has been very much less than might have been expected. The course and result of that which has arisen has necessarily depended in each case very much upon the peculiar language of the law. It is fully discussed in the chapter on "Shares and Shareholders."

§ 656. **An Irregularity in the Original Organization** of the corporation, which, had the matter been pressed, might at any time have resulted in the forfeiture of the charter, will not operate to relieve the shareholders from their liability for the ultimate redemption of the circulating notes.[1] But any individual shareholder who took any part in the irregular organization cannot recover anything from another shareholder upon any notes he himself may happen to hold.[2] If a bank, for the purpose of redeeming its circulating paper, makes a valid assignment of assets sufficient for that purpose, it is incumbent upon the shareholders, who are ultimately liable for the redemption, to keep such supervision as may be deemed requisite over the transactions of the assignees. If these persons embezzle or misappropriate or waste the assets, the shareholders still remain liable to make good the deficiency. The assignees are in fact agents of the shareholders. The bill-holders are merely beneficiaries, without being active parties to the arrangement or able to veto it; they are accordingly under no obligation to maintain any watch over the assignees, and will not be required to suffer for their default.[3]

[1] § 655. Cochituate Bank *v.* Colt, 1 Gray, 382.

[2] Robinson *v.* Bank of Darien, 18 Ga. 65; Grew *v.* Breed, 10 Met. 569; Cochituate Bank *v.* Colt, 1 Gray, 382.

[1] § 656. McDougald *v.* Bellamy, 18 Ga. 411; McDougald *v.* Lane, id. 444.

[2] Robinson *v.* Lane, 19 Ga. 337. [3] Ibid.

If the charter or the organic law reserves a power to the legislature to alter or modify any of the provisions of such charter or law, a statute may at any time afterward be passed to render the shareholders liable for the circulation. The reservation in the charter or law prevents the subsequent enactment from being unconstitutional. It has also been held that, if the natural construction of the later statute expresses a clear intention to cover all corporations which it can legally cover, all those which were capable of such modification would be considered as coming within its terms.[4]

§ 657. **Liability of Officers.** — Unfaithful management on the part of the bank officials, which renders them liable to the corporators, does not necessarily render them also liable to the bill-holders.[1] Even if they could be held to such a liability, the Statute of Limitations will run in their favor. If the statutory period has elapsed since the malfeasance or negligence took place, *a fortiori* if it has elapsed since the failure or stoppage of the bank, the liability will be at an end.[2]

§ 658. **A Bank Bill stolen from the Bank and fraudulently** put in circulation is good as against the bank in the hands of any *bona fide* holder for value, provided the bill was *completed* in its execution as an instrument at the time of the theft. But if it was *incomplete* in any material respect, and this defect was fraudulently supplied subsequently to the robbery, then its redemption cannot be enforced.[1] The cited case was argued by eminent counsel, and excited unusual interest at the time. The bills sued upon had been completed in every respect with the exception of the president's signature. In this condition they were put away in the cashier's desk, a place of very slight security, and were thence stolen; the

[4] In re Reciprocity Bank, 29 Barb. 369; 22 N. Y. 9.

[1] § 657. Branch *v.* Roberts, 50 Barb. 435.

[2] Hinsdale *v.* Larned, 16 Mass. 70.

[1] § 658. Salem Bank *v.* Gloucester Bank, 17 Mass. 1; Gloucester Bank *v.* Salem Bank, id. 33; and see Baxendale *v.* Bennet, 3 Q. B. D. 525 (1878), a case illustrating the same principle, though not a bank-note case. The forgery, not the previous neglect, was the proximate cause of loss.

president's signature was forged, and they were placed in circulation. Of course the bank had never executed its promise, and so was not technically liable. But the plaintiffs, among other arguments, urged that the bank should be held liable, on the ground that it had been guilty of gross negligence in leaving the bills thus exposed when they were in a state so nearly perfect. The court, however, held that no case was made out. The fact that the independent crime of forgery necessarily intervened between the theft and the issuing, and was indispensable to the possibility of issuing, rendered it impossible to hold the bank.

§ 659. **Payment or Deposit of Forged Notes.** — Payment made in forged bank bills is no payment; whence it follows that a deposit of forged bank bills in a bank, though credit therefor be at the time given to the depositor, does not create a debt from the bank to him. So soon as the falsehood of the bills is discovered, the receiver of them may recover back or recoup the amount. This is under the general rule of law, that in every sale of personal property the vendor impliedly warrants it to be in fact what it is described and purports to be, and that he has a good title and right to transfer. A forged bank bill is in fact *not* a bank bill.[1] A counterfeit is not money or cash, as the act of transfer represents it to be, but a nullity, and the debt remains undischarged.

But the receiver of forged notes must give prompt notice upon discovery of the fact, and what is reasonable diligence is a question of fact on the circumstances of each case.[2] Six months,[3] four months,[4] two months,[5] fifteen days[6] (where the notes

[1] § 659. Young *v.* Adams, 6 Mass. 182; Salem Bank *v.* Gloucester Bank, 17 Mass. 1; Cabot Bank *v.* Morton, 4 Gray, 156; Markle *v.* Hatfield, 2 Johns. 455; Herrick *v.* Whitney, 15 id. 240; 5 Taunt. 488; Ramsdale *v.* Horton, 3 Pa. 330; Eagle Bank *v.* Smith, 5 Conn. 71; Pindall *v.* N. W. Bank, 7 Leigh, 617; Mudd *v.* Reeves, 2 H. & J. 368.

[2] Simms *v.* Clark, 11 Ill. 137.

[3] Raymond *v.* Baar, 13 Serg. & R. 318.

[4] Pindall *v.* N. W. Bank, 7 Leigh, 617.

[5] Thomas *v.* Todd, 6 Hill, 340.

[6] Gloucester Bank *v.* Salem Bank, 17 Mass. 44.

received purported to be those of the receiving bank), have been held too great a delay after discovery.

(*a*) And where a payment or deposit is made in bills purporting to be those of the receiving bank, the means of information are not equally within reach of the parties. The bank is properly held to greater diligence as to its own pretended obligations than a stranger, and if the bank is negligent in receiving the bills, or in failing to discover the forgery, or to give notice after discovery, and the error cannot be corrected without placing the depositor (he being innocent) in a worse position than if the bank had discovered the fraud at once on presentation, and refused the bills, the bank cannot return them. (1) This is holding the bank on the ground of negligence and damage. (2) It cannot be held on the ground of ratification until it knows the fact of the forgery. (3) But there is another ground of liability, which we have noticed in speaking of the responsibility of a bank for a notary or correspondent; namely, the fact that the bank occupies the best position to prevent loss, and that its negligence is a difficult question, involving costly suits, and that, as the diligence proper to the case is very near the line of absolute responsibility, it is best for the welfare of the public to hold the bank absolutely to bear the loss, as between itself and the depositor in good faith. The last rule does not commend itself in this class of cases, for the complications and distant investigations that are incident to questions of liability of correspondents, and in railroad cases, &c., are absent here. At all events it should be clearly kept in mind that on neither the first nor the third ground can the bank be denied the right of return if it will not prejudice the depositor.

§ 660 **From the Gloucester Bank Case** it seems that if the bills were paid in and credit was given at once in the hurry of business hours, and that if on the first possible opportunity afterwards on the same day the bank officers should examine the bills, find them forged or false, and at once notify the depositor, the repudiation would be in time to save the bank, at least unless the depositor had suffered substantial injury by reason

Examination as soon as conveniently possible; the same day is probably sufficient.

of the delay. *The bank should have a reasonable time to examine the bills;* and though this limit of reasonable time should be construed with great strictness and so as to hold the bank to great promptitude, still it could hardly be said that the receiving officer should pause in the midst of business hours to examine the marks of identification on each one of a large number of bills. It has been well said, that in such cases the bank must be allowed to put some, at least temporary, confidence in its customers. In the case named bills purporting to be of the Gloucester Bank were handed to its cashier in his absence from the bank. In return he gave a cashier's check for the amount. The court said that, if they had been examined promptly upon their coming into the bank, and at once rejected, this would have been in time to save the bank, which could not be considered to have actually taken its notes in payment until it had had time to examine and count them; but since it had put them away for several days before making such examination, it must be held to have adopted them. In this case it was not questioned but that the party paying in the false bills did so in good faith. If he were guilty of any species of fraud, of course the bank would be relieved thereby, as towards him, from the ordinary consequences of its laches. The Bank of United States *v.* Bank of Georgia[1] is quoted as authority that a bank receiving bills purporting to be its own adopts them, and cannot afterward be heard to say they were forged. The court said, in substance, that in general a payment in forged paper is not good, and if there be no negligence the consideration may be recovered or suit brought on the original demand.

But this principle does not apply to the case of a bank receiving on deposit as cash its own notes, actually issued by it, but fraudulently altered while in circulation. The bank has the means of knowing if the notes are genuine; if these means are not employed, it is evidence of negligence. The taking of its own bills in such an absolute manner is an adoption of them. "Proof of actual damage may not be within reach

[1] § 660. 10 Wheat. 333 (1825).

of the depositor, and therefore to confine the remedy to cases of that sort would fall far short of the actual grievance. The law will therefore presume a damage, actual or potential, sufficient to repel any claim against the holder." This certainly will not stand as a principle of law. It is in discord with the whole tone of the law to hold that, when A. has made a mistake, he shall not recover the money because B. is presumed to be damaged. And even if such a principle could be admitted, it could not prevent recovery if the bank could show positively that B. had not been damaged by the delay. The court goes beyond the facts of the case, for the judge says that the bank was negligent, since by ordinary examination the fraud would have been discovered, and no notice was given to the depositor till eighteen days after the deposit. The analogy of the old cases on forged bills is relied on, and Price *v.* Neale quoted. (But the old idea that a bank must be held absolutely to know the signature of its correspondent is exploded.) Moreover, the court quotes without dissent, but among the authorities upon which its decision is based, these words from Gloucester Bank *v.* The Salem Bank: "The true rule is that the party receiving such notes must examine them as soon as he has opportunity, and return them immediately. If he does not he is negligent, and negligence will defeat his action. This principle will apply in all cases where forged notes have been received, but certainly with more strength when the party receiving them is the one purporting to be bound to pay." On the whole, therefore, this United States Bank case is not authority for denying that a bank may return such notes if an examination is made within a reasonable time. So far as its language affirms this, it is *obiter*, and based on a dead analogy, and inconsistent with the living authorities quoted as its own warrant.[2]

§ 661. **Change of Numbers vitiates.** (See § 650 *a.*) — The Bank of England stopped payment of certain of its notes payable to bearer, giving notice of their numbers. T. altered the numbers. S. bought the bills in good faith and

[2] Bank of United States *v.* Bank of Georgia, 10 Wheat. 333.

for value. It was held that the alteration did not affect S.'s right of action against the bank;[1] but on appeal this was reversed, the court saying that, although the change did not vary the contract, it was an alteration in an essential part, and vitiated the notes.[2] In this case the court dissented from Caldwell *v.* Parker,[3] which decided that erasure of the signatures to a deed of indemnity after execution did not avoid the deed.

§ 662. **Warranty of Solvency.** — If the transferrer warrants, or represents that the notes are good for their face, or agrees to take the risk, he is held.[1] But in the absence of agreement to the contrary, bank bills are circulated upon the credit of the bank which issues them, not upon that of any individual who pays them over to another. Hence it follows that there is no warranty of value, or of ultimate payment, upon the transfer of a bank note; though it is probable that there is a warranty of its genuineness, as being in fact a note for the amount named on its face, issued and payable by the bank by which it purports to have been issued and to be payable.[2]

No warranty of value.

If a payment is made in bank notes, (1) and the bank is solvent at the time of payment, any loss by subsequent insolvency falls on the payee; but (2) if the bank is insolvent at the time of payment, the authorities are not agreed, in case the parties are ignorant of the insolvency. Of course if the payor knew of that fact, and did not disclose it, no court would sustain the payment.[3]

Payment in notes of insolvent bank.

(*a*) **In New York**[4] it was held that "the law is well settled,

[1] § 661. Suffell *v.* Bank of England, 7 Q. B. D. 270.

[2] Suffell *v.* Bank of England, 9 Q. B. D. 555 (1881).

[3] Ir. Rep. 3 Eq. 519 (1869).

[1] § 662. Jefferson *v.* Holland, 1 Del. Ch. 116 (1820); Corbit *v.* Bank of Smyrna, 2 Harr. 235; Frontier Bank *v.* Morse, 22 Me. 88; Aldrich *v.* Jackson, 5 R. I. 218; Commonwealth *v.* Stone, 4 Met. 43; Gilman *v.* Peck, 11 Vt. 516; Wainwright *v.* Weber, 11 Vt. 576; Hellings *v.* Hamilton, 4 Watts & S. 462; Markle *v.* Hatfield, 2 Johns. 455.

[2] Edmunds *v.* Digges, 1 Gratt. 359.

[3] Commonwealth *v.* Stone, 4 Met. 43.

[4] Ontario Bank *v.* Lightbody, 13 Wend. 104. See also Houghton *v.*

that, where the note of a third person is received in payment of an antecedent debt, the risk of his insolvency is upon the party from whom the note is received, unless there is an agreement or understanding between the parties, either express or implied, that the party who receives the note is to take it at his own risk. The same principle is applicable to the notes of an incorporated bank, except that as to the latter there is always an implied understanding between the parties that, if the bill at the time it is received is in fact what the party receiving it supposes it to be, he is to run the risk of any future failure of the bank."

But to hold the transferrer on this warranty of solvency at the time of transfer, the transferee must within a reasonable time present the bills for payment, or put them in circulation. The loss will fall on the transferee if by ordinary diligence he could have prevented it.

(*b*) **In Delaware** [5] directly the contrary is held. "When a bank note is given *bona fide* and received without objection, in exchange for goods, money, notes, or bills, or on general deposit by a bank, and there is no agreement or understanding, express or implied, between the parties as to which of them shall stand the risk of the then or future solvency of the bank issuing such note, the party thus receiving such note assumes all the risk of its solvency, and is without remedy against the person from whom he thus received it, although it may afterwards appear that the bank issuing such note had at the time of the transaction failed."

(*c*) The Delaware rule is certainly in far better accord with business usages and the analogies of the law. Bank bills are circulated on the credit of the issuing bank, not on that of the individual paying them; they are intended to circulate indefinitely, and it would render commercial transactions very uncertain and indefinite to hold that *bona fide* payments could be opened up in this way. There is no war-

Adams, 18 Barb. 545; Harley *v.* Thornton, 2 Hill (S. C.) 509; Townsends *v.* Bank of Racine, 7 Wisc. 185; Fogg *v.* Sawyer, 9 N. H. 365; Westfall *v.* Braley, 10 Ohio St. 188.

[5] Corbit *v.* Bank of Smyrna, 2 Harr. 235.

ranty of value or of ultimate payment on the transfer of a bank note.[6]

Gibson's remarks in Bayard *v.* Shunk make this matter so clear that we quote them at some length: "The assertion that it is always an original and subsisting part of the agreement that a bank note shall turn out to have been good when it was paid away, can be conceded no farther than regards its genuineness. That genuine notes are supposed to be equal to coin is disproved by daily experience, which shows that they circulate by the consent of the whole community at their nominal value, when notoriously below it. But why hold a payer responsible for a failure of the bank only when it has been ascertained at the time of the payment, and not for insolvency ending in an ascertained failure afterward? As the bank may have been actually insolvent before it chose to let the world know it, we must carry his responsibility back beyond the time when it ceased to redeem its notes, if we carry it back at all. Were it not for the conventional principle that the purchaser of a chattel takes it with its defects, the purchaser of a horse with the seeds of mortal disease in him might refuse to pay for him, though his vigor and usefulness were yet unimpaired; and if we strip a payment in bank notes of the analogous cash principle, why not treat it as a nullity, by showing that the bank was actually, although not ostensibly, insolvent at the time of the transaction? It is no answer to say the note of an unbroken bank may be instantly converted into coin by presenting it at the counter. To do that may require a journey from Boston to New Orleans, or between places still farther apart, and the bank may have stopped in the mean time; or it may stop at the instant of presentation, when situated at the place where the holder resides. And it may do so even when it is not insolvent at all, but perfectly able eventually to pay the last shilling. This distinction between previous and subsequent failure, evinced by stopping before the time of the transaction

[6] Edmunds *v.* Digges, 1 Gratt. 359; Bayard *v.* Shunk, 1 Watts & S. 92; Scruggs *v.* Gass, 8 Yerg. 175; Ware *v.* Street, 2 Head, 609; Lowery *v.* Murrell, 2 Port. 286 (Ala.).

or after it, is an arbitrary and impracticable one. To such a transaction we must apply the cash principle entire, or we must treat it as a transfer of negotiable paper, imposing on the transferee no more than the ordinary mercantile responsibility in regard to presentation and notice of dishonor. There is no middle ground. But to treat a bank note as an ordinary promissory note would introduce endless confusion, and a most distressing state of litigation. We should have reclamations through hundreds of hands, and the inconvenience of having a chain of disputes between successive receivers would more than counterbalance the good to be done by hindering the crafty man from putting off his worthless note to an unsuspecting creditor. No contrivance can prevent the accomplishment of fraud, and rules devised for the suppression of petty mischiefs have usually introduced greater ones.

"The case of a counterfeit bank note is entirely different. The laws of trade extend to it only to prohibit the circulation of it. They leave it, in all besides, to what is the rule of both the common and the civil law, which requires a thing parted with for a price to have an actual, or at least a potential existence (2 Kent, 468), and a forged note, destitute as it is of the quality of legitimate being, is a nonentity. It is no more a bank note than a dead horse is a living one; and it is an elementary principle, that what has no existence cannot be the subject of a contract. But it cannot be said that the genuine note of an insolvent bank has not an actual and legitimate existence, though it be little worth; or that the receiver of it has not got the thing he expected. It ceases not to be genuine by the bank's insolvency; its legal obligation as a contract is undissolved; and it remains a promise to pay, though the promisor's ability to perform it be impaired or destroyed. But as the stockholders of a broken bank are the last to be paid, it is seldom unable in the end to pay its noteholders and depositors, and, even where nothing is left for them, its notes may be parted with at a moderate discount to those who are indebted to it. We seldom meet with so bad a case as the present, in which everything like effects, and

even the vestiges of the bank, disappeared in a few hours after the first symptoms of its failure. But, independent of that, the difference between forgery and insolvency in relation to the transfer of a bank note is as distinctly marked as the difference between title and quality in relation to the sale of a chattel."

(*d*) When bills are deposited (not those of the depositary) the credit may be cancelled if they are not honored on prompt presentment. M. W. deposited certain country bank notes payable in London, representing £80 in value, with a banking company, and received the following memorandum signed by the manager: "Received of M. W. £80, for which we are accountable. £80, at 3 per cent interest, with fourteen days' notice." The notes were sent on the same evening by post to the London agents of the banking company, and were presented on the next day, and refused payment. They were transmitted by that night's post to the banking company, who, on the following day, gave notice of dishonor to M. W., and tendered to him the notes, which he refused. It turned out that the bank which had issued the notes had stopped payment upon the day when M. W. made the deposit with the banking company, but that neither M. W. nor the company were then aware of this. It was held, that, under the above circumstances, M. W. could not maintain an action, either for money lent, or for money had and received, against the banking company.[7]

§ 663. **Pledge of Bills.** — Bills which have been improperly pledged to a creditor of the bank, as security, with the distinct understanding that they shall not be put in circulation, but shall be held strictly by way of security, do not constitute a part of the circulating paper of the bank. The pledgee is not a bill-holder, and is not entitled to any of the rights or privileges which are accorded to bill-holders. He cannot use the bills as bills, but must come in as an ordinary creditor on his debt.[1] It seems that, if a bundle of bank bills be left as collateral security, the same bills are to be kept and re-

[7] Timmis *v.* Gibbins, 14 Eng. L. & Eq. 64.

[1] § 663. Davenport *v.* City Bank of Buffalo, 9 Paige, 12.

turned, and not other bills of an equal value. Thus, where a party borrowed from a bank a certain sum in notes of the Confederate States, and gave to the bank, as security, the like sum in its own bills, it was held that trover would lie to recover the bills, on the ground that the title in the specific bills had not passed, leaving only a debt of that amount due from the bank to the borrower upon return of the Confederate notes; but that the identical parcel of bills remained the property of the borrower, who had the right to redeem and receive the same by payment of the borrowed notes.[2]

§ 664. **Issue of Circulating Notes by Banks of States.** — In divers States, banks have been established which were, properly speaking, State institutions, and not corporations of the ordinary sort, established by individuals from their private funds and conducted by them for their private benefit. The various institutions of this description do not of course repeat each other in all matters of detail, but those of them at least which have come into the courts resemble each other in their main features, and consequently in the legal character impressed by those features. Formally, a corporation is created. It has its corporate name and seal, its president, directors, and other customary officers of the bank. But the election of the officers is reserved to the legislature. The capital is supplied from the public treasury or from the pledge of public revenues, and the State is the sole stockholder. Further, the State sometimes directly guarantees the ultimate redemption of the circulation; for these banks have been uniformly banks of issue; in fact, the plausible purpose of their creation has usually been the furnishing of a stable and reliable currency for the people of the Commonwealth. The assumption of this function it is which has caused the constitutionality of the banks and the legality of their notes or bills to be questioned, on the ground that the issuing of these notes or bills was in truth and in substance the emission of bills of credit by the State, in contravention of the provision of the National Constitution. Twice the Supreme Court of the United States has

Not unconstitutional, though they are guaranteed by the State.

[2] Abrahams *v.* Southwestern R. R. Bank, 1 S. C. N. S. 441.

had occasion to hear and determine causes involving this point, and each time, after thorough arguments, the decision has been in favor of the constitutionality of the bank and the validity of its bills or notes.[1]

§ 665. **Bills of Credit.** — The reasoning in the opinions which embody these rulings must be regarded as perfectly satisfactory. The definition of the term "bills of credit" has, not unnaturally, given considerable difficulty to the judges. Perhaps the best is to be found in the cause cited from 11 Peters, which is as follows: "A paper issued by the sovereign power, containing a pledge of its faith, and designed to circulate as money." To whatever other criticism this may be open, it certainly must be deemed broad enough. Even if it be conceivable that an instrument could fall within this description and not be a bill of credit, it must at least be admitted that an instrument which does not fall within this description cannot be a "bill of credit" in the sense of the prohibition of the United States Constitution. It does not require much thought to see that the bills or notes issued by the bank of a State do not display these characteristics. They are not issued by the sovereign power, not even by an agent, at least in a legal sense, of the sovereign power. They are issued by an independent corporation, having every essential and customary attribute of a complete and perfect corporate banking company. *They are not issued upon the credit or faith of the State. They do not on their face bear any promise or pledge by or even on behalf of the State for their redemption.* The directors of the bank have no authority to offer such a pledge. On the contrary, they put forth instruments whose promise purports to be and is based upon the corporate responsibility solely. The corporation may be sued on the bills. It *has assets and a capital. It is upon the faith or credit of these primarily and immediately that the circulating notes are issued, or must be conclusively presumed to be issued.* A contingent

The corporation is independent of the State.

[1] § 664. Briscoe *v.* Bank of the Commonwealth of Kentucky, 11 Pet. 257; Darrington *v.* Bank of the State of Alabama, 13 How. (U. S.) 12; Owen *v.* Branch Bank at Mobile, 3 Ala. 258.

and remote undertaking of the State finally to redeem them if the bank is unable to do so, does not in the view of the law constitute the credit upon which they are issued or circulate.

(*a*) A case which came into the Supreme Court from the State of Missouri is useful in this connection, as demonstrating by contrast the accuracy of these positions.[1] In that case promises to pay were issued under legislative authority; they were signed and countersigned, and offered to the public by State officials; they were to be redeemed in a designated manner also by State officials out of public moneys; they ranged in denomination from fifty cents to ten dollars each. It could not be questioned that these were properly "bills of credit." When the genuine bill thus appears in its proper shape, it appears as a very different article from the bank notes of the Bank of the State of Alabama or of the Bank of the Commonwealth of Kentucky. This brief disposition of the topic suffices only for stating what must be deemed a doctrine established beyond possible question hereafter, and which, as such, would not justify a longer discussion here; but the cited cases, especially that in 11 Peters, are very exhaustive, and deserve thorough examination if the complete history of the discussion is sought for.

Real case of bills of credit.

§ 666. **Miscellaneous Rulings.** — Statutory provisions restricting banks from issuing the bills of banks not incorporated within the same State have been quite common. In their absence, a bank may of course pass over its counter and circulate any species of money, not absolutely illegal, which the customer will take.[1] Such laws do not, however, prevent the sale of foreign bills by one bank to another, simply for the purpose of facilitating their redemption.[2] But if a bank in another State establishes, in a State where such legislation exists, an agency to discount bills with its own bank notes, this would be a violation of the law. The bank would ac-

Statutes restricting issue of foreign bills. Distinction in favor of general deposit of such bills.

[1] § 665. Craig *v.* State of Missouri, 4 Pet. 410.

[1] § 666. Ballston Spa Bank *v.* Marine Bank, 16 Wisc. 120.

[2] Buffalo City Bank *v.* Codd, 25 N. Y. 163.

quire no title to the bills so discounted, and could not maintain a suit for their collection.[3] A much finer distinction was drawn in a case decided in the State courts of Alabama,[4] — a distinction which seems rather too subtle to be generally adopted, but which shall be given for consideration. A banking company, it was held, receiving from a foreign banking corporation bills of that corporation upon *general* deposit, would be entitled to pay them out again, since they would be simply its own money. Neither would it make any difference that it had agreed with the foreign bank to redeem all such bills presented at its counter. It is not the agent of the foreign bank to "issue" such bills, in which case there would certainly be a violation of the statute. The decision, it was intimated, might have been different, had the declaration alleged a *special* deposit of these bills to the end that they should be paid out as money for the benefit of the depositor. Where the same law in one section declares it to be a misdemeanor to "pass or receive" notes below a certain denomination, and in another section inflicts the penalty of a fine upon a bank which "makes or issues" such, the former section does not apply to a bank paying such over its counter. The latter section is exclusive of the other, and can alone be enforced against the corporation.[5]

A statute "to prohibit" the issuing and circulating of unauthorized bank paper creates a liability in tort, and not in contract, for its breach.[6] A principle, which would seem too obvious to require judicial sanction, has been declared in Massachusetts, that a bank cannot issue bills or notes upon the basis of a "special" deposit.[7] This deposit could not be used for their redemption; it cannot be availed of in business transactions to produce profit and increase the funds of the bank. The bank has not even the right to meddle with it temporarily further than is essential for its safe keeping. In

[3] Bowman *v.* Cecil Bank, 3 Grant, 33.
[4] Wray *v.* Tuskegee Ins. Co., 34 Ala. 58.
[5] State *v.* Bank of Fayetteville, 3 Jones, Law, 450.
[6] Lawler *v.* Burt, 7 Ohio St. 340.
[7] Foster *v.* Essex Bank, 17 Mass. 479.

Pennsylvania the State law required banks to keep their circulation at par, and imposed a forfeiture amounting to a certain percentage upon their circulating paper if they failed to do so. It was held by the courts that the phrase "at par" signified ordinarily equivalent to gold and silver for financial and commercial purposes; also that the forfeiture was in the nature of a penalty, not of a tax.[8]

[8] Harrisburg Bank *v.* Commonwealth, 26 Pa. St. 451.

CHAPTER XLI.

STOCKS AND STOCKHOLDERS.

§ 667. Analysis.

A. Liabilities of Stockholders.

I. A subscriber (one who signs the articles of association, 674 with a
§§ 668–674. certain number of shares opposite his name) is liable for the full amount of his original subscription; 668 and this liability is not discharged by

(*a*) The invalidity of the subscription of another, 670

(*b*) Nor the provision for forfeiture 670 of the stock in case of nonpayment, this being a cumulative remedy,

(*c*) Nor any irregularity 669 in the organization of the bank,

(*d*) Nor a release 671 from the directors, (except as to creditors after the release,)

(*e*) Nor the Statute of Limitations, 672 (for this does not run so long as the bank does business,)

(*f*) Nor a transfer of his rights as a subscriber, (before issue of stock,) unless the transferee is accepted by the bank, 673

(*g*) Nor a plea of failure of consideration by reason of the vanishing of all hope of dividends, nor even the return of the principal from the ruined corporation

Will avail to relieve a subscriber, so long as there are *bona fide* creditors of the bank.

But a subscriber is relieved by

(*h*) A discharge in bankruptcy, 671

(*i*) Or a transfer of his rights as subscriber (the transferee being accepted by the bank in good faith). 673

§ 669. The debt of a subscriber subsists independently of a note he gives for it.

§ 719. Stockholders who pay their subscriptions in notes of the bank are allowed only what they gave for the notes.

§ 719. An ostensible increase of stock must be paid up for the benefit of creditors.

II. A stockholder may be liable beyond his original subscription.

§§ 675–686. (*a*) By agreement, as when the corporation is held out to the world as a partnership.

(*b*) By statute.

§ 675. (1) The measure of liability is very different in different States, the commonest being that the stockholders shall be held to redeem the bank notes fully, and to pay the just debts of the

bank to the extent of a sum equal to the par value of the stock held by them.

(2) The legislature can always give a new "remedy," i. e. a new pro-
§§ 676, 677. cess for recovery upon an existing liability,[677] but cannot, *after organization* of the bank, create any responsibility beyond that attaching of common law, (viz. the loss of the amount paid on shares or subscribed,) unless such power is reserved in the law under which the bank is organized.[676]

(3) *The Statute of Limitations* runs from the time a right of action ac-
§ 678. crues; in case of deficiency of capital at the time of loss, in case of redeeming circulation, &c., from the insolvency of the bank. .

(4) *Who is liable as a shareholder* is to be determined by the apparent
§§ 679–686. ownership, (unless the appearance is without fault[679] of him whose name appears on the books,) and by the real beneficial ownership.[680]

If P.'s name (though he is only a pledgee) once appears on the books as owner by his consent, he cannot avoid his liability by a colorable transfer to C. on the understanding that the stock is to be retransferred on request, nor by any transfer to an irresponsible person.[681, 683]

Nor can a *purchaser* avoid liability by having the transfer made in the name of an irresponsible person.[683]

But a pledgee may gain the security of the stock as a pledge, and yet avoid liability as a shareholder by having the transfer from the bailor, B., to an irresponsible person, D.[684]

D. is liable as apparent owner; B. is liable as the beneficial owner, and, as the last apparent owner, responsible. But P. is neither the beneficial owner, nor has he ever appeared on the books.

In Ohio, in case of transfer, the assignee is primarily liable, and impliedly contracts to indemnify the assignor for all subsequently accruing calls; but after liability attaches to one as a stockholder, he cannot shake it off by assignment.[682]

§ 686. *Liability of estate of deceased* stockholder.

§ 696. (5) *Who can sue.* A stockholder, who is also a creditor, cannot sue a brother stockholder on his statute liability, for that would give
§ 692. a practical set-off, and defeat the protection of outside creditors
§ 696. intended by the law. Outside creditors may sue, and the receiver, if authorized. See next paragraph.

(6) *Form of suit.* In some States, the suit may be at law against a single stockholder, and he has his remedy over for contribution.
§ 693. In others, a bill in equity is the proper form of suing, and this is certainly far more just. The best plan is that of the national
II. § 50. banking law, where the receiver enforces the liability of the stock-
§ 12. holder, as this saves all extra suits and questions of prior recourse against the bank, and brings the whole matter under one control, so that a calculation of the extent to which each stockholder must be assessed is easy, and the numerous complications resulting from lawsuits against single stockholders are avoided.

§ 687. (7) Whether recourse must be had to the bank before suing the stockholders is disputed.

§ 688. A judgment against the bank is only *prima facie* evidence against a stockholder.

(8) Extent of liability in a suit against a stockholder is determined by the following proportion :

§ 694. As the whole stock is to the defendant's portion of stock, so is the whole indebtedness for which the stockholders are liable to the portion of it that the defendant is to pay. From this is to be taken any portion of this indebtedness that said defendant has

§ 691. already paid. But, otherwise, he cannot offset a debt due him from the bank.

§ 689. *Interest* can be recovered only from the date of demand on the defendant individually.

In Massachusetts, no interest is allowed.

A creditor can recover only what he paid on claims bought at a dis-

§ 695. count after the failure of the bank.

(9) Defences.

§ 690. If the creditor knew or ought to have known that in contracting the debt the directors exceeded their power, he cannot recover.

(10) Contribution

§ 692. May be enforced against other stockholders by one who has paid more than his share, except that an officer guilty of malversation cannot sue a stockholder.

B. Lien of a Bank on its Stock.

(1) Creation. See General Principles of Lien, § 323.

§ 698 A. (*a*) A national bank is forbidden to loan on its stock, and a lien being inconsistent with this, no provision in the articles of association or by-laws can create such a lien.

§ 697. (*b*) As to State banks, there is no common law lien, but an adverse common law right of the stockholder to transfer his property.

(1) The charter may give a lien; also

§ 698 A. (2) The articles of association.

§§ 697, 698. (3) So, if there is a usage or a by-law giving a lien, and the

§ 9, n. 11. stockholder knows of it at the time he borrows of the bank, his assent is justly presumed, and the lien is good against him and his assignee in insolvency, and any assignee with notice.

§ 698. (4) As to an assignee without notice, the effect of a by-law lien (not authorized by a higher law) is doubtful; probably he is not affected.

If the assignee has no notice *either of the debt* or the by-law, he takes an unimpeachable title, under the rules of negotiability.

(2) Effect.

Any transfer in derogation of a valid lien is of no effect as

§ 699. against the bank. Often the lien is protected by a rule that no transfer shall be made so as to bind the bank, except on

the books of the corporation. But after the bank has notice of a transfer, it cannot hold the shares against the assignee for any subsequently created debt of the assignor.

§ 702. The lien secures a debt not yet mature, (Maryland *contra*,) and attaches to the whole stock of the debtor; no part of it can be sold by him. § 329.

§ 700. But the bank, after using its lien, and applying the stock to its debt, is postponed, as to the rest of the debtor's property, to the other creditors.

(3) Waiver.

(*a*) Other security taken by the bank will release the stock, (unless
§ 701. the lien is reserved expressly,) but the tender of other secu-
§ 704. rity not accepted by the bank will not release the stock; the bank cannot be compelled to exchange securities. See § 330.

§ 701. (*b*) By allowing a transfer on the books, without expressly reserving its lien, it is waived.

(4) The *Statute of Limitations*,

When it affects only the right of action, and does not destroy
§ 701. the debt, has no effect on a lien, for it is appurtenant to the debt.

(5) *Sureties*.

§ 703. Who pay the bank are subrogated to its rights, lien and all.

C. Shareholder's Rights.

§ 706. (1) To surplus assets after the bank's debts are paid.

§ 692. (2) To contribution, when paying more than a due share.

§ 707. (3) To new shares. Existing shareholders have the first right to subscribe for new shares issued after all the original capital stock is subscribed for, in proportion to the shares they already hold.

(4) To dividends.

§ 708. Demand must be made at a time when it is the bank's duty to
§ 716. pay, before suit can be brought.

§ 720. (5) To restrain officers from wrongful acts by injunction, in some cases, as wrongful alienation of property.

(6) To sue the directors for mismanagement, gross neglect, or malfeasance in office, whereby loss accrues. The suit may be in tort.

§ 717. Declaring dividends from the capital instead of from profits is a cause of action. In case of a national bank, the receiver may sue the directors (when there are no proceedings for forfeiture) unless the receiver himself is one of the guilty officers; then the stockholders may sue. But a New Jersey case holds (on grounds that apply to all banks) that a stockholder cannot sue the directors for official default, for they are officers of the bank; there is no privity with the stockholders, and beside, anything recoverable is assets of the bank, upon which its creditors have the first claim.

(7) To transfer stock.

If the bank has a valid lien, (B above,) or the required formali-
§ 709. ties are not observed, it may refuse to allow a transfer on
§ 714. its books; otherwise the purchaser may sue the bank for

refusal, and recover the value of the stock, as for a conversion.

§§ 711, 714. The bank is liable for allowing a wrongful transfer.

§ 715. Specific performance of a contract to sell shares will not be enforced if the object is to gain control of the bank. Public policy forbids.

As between an assignee under an unrecorded transfer and an attaching creditor,

(*a*) If there is no positive law declaring that transfers not recorded on the books of the bank are void as to creditors, or requiring specific acts to create a valid transfer, the principle that creditors take their debtor's property subject to all *bona fide* liens and equitable transfers will prevail.

(*b*) If the general law provides that transfers shall only be
§ 710. made on the books, declaring, like registry laws, that no unrecorded title shall be good, or only against those with actual notice, Maine, Massachusetts, and Connecticut hold that the creditor prevails.

§ 712. (*c*) Connecticut holds that if the by-laws declare that transfers shall be made only on the books, no other transfer is good for any purpose.

§ 710 *a*. (*d*) If the provision is that transfers shall be made "only on the
§ 711. books of the bank, and on surrender of the certificate,"

Neither the attaching creditor nor the transferee has conformed to the requirements for a legal title, the transferee has not recorded, and the creditor cannot surrender the certificate. As the matter is left to the equities, if both have acted in good faith, the prior right of the transferee should prevail.

§ 713. (*e*) The better opinion is, that all such provisions are intended
§ 710. merely for the benefit of the bank, (determining who
§ 713. Cal. shall vote as a stockholder, and to whom dividends may safely be paid, and protecting any lien the bank may have,) and not at all for the benefit of any third parties, and that stock is negotiable by delivery of the certificate with an irrevocable power of attorney to have the transfer made on the books.

§ 713. Therefore, one who takes stock in this way, *bona fide* for value, without notice of prior equities, has a clear title against all but the bank.

One who took from a pledgee, who held the certificate and power, without notice of the pledgor's rights, held against the latter.

§ 720. D. Mandamus to enforce Transfer.

E. The Bank as a Shareholder.

(1) A bank may take its own stock to *save* a debt.

§ 716. (2) In some States, banks may loan upon their own stock, or even
§ 77. purchase it.

§ 59. Usually this right is limited, and national banks are prohibited
II. § 35. from exercising it.
F. Sovereign States as Shareholders
§ 718. Have the same rights as other shareholders, and cannot, by legislation, appropriate to themselves more than their fair share of the assets.
§ 718 *a*. The same rule holds when the State is a *depositor*.
G. A shareholder may become a competent witness for the bank by assigning his stock. § 113 *b*.

§ 668. **Liability of Subscribers for the full Amount of their Subscriptions.** — The obligation of payment upon a subscription for shares in the capital stock of a banking corporation is created and perfected by the act itself of subscription. In the absence of a proviso to the contrary, the whole amount is payable immediately upon demand. But it may be stated that it shall be demanded only in instalments of specified amounts, respectively, to be called for not before certain periods; and the statement will enter into and become a valid part of the contract of subscription, except in cases where it conflicts with the charter or the organic law under which the corporation exists. But no statement, however explicit, in the original contract of subscription, can relieve the subscriber from the ultimate necessity of paying the full par value of the full number of shares he subscribes for, so long as any creditors of the corporation remain unpaid.[1]

§ 669. **The Shifts to which Shareholders** who have only paid a portion of the par value of their shares have resorted, in order to avoid further payments after the corporation has proved unsuccessful, are very numerous. But they have uniformly met with well deserved failure, at least so long as *bona fide* debts of the bank were outstanding. Among the most common of these subterfuges has been an agreement or understanding entered into at the time of subscription between the subscriber and the directors, to the effect that only a partial payment, or sometimes even no real payment at all, shall be demanded. Notes of the nominal subscriber are then given, upon which it is agreed that no collec- Giving notes. See § 719.

[1] § 668. Palmer *v.* Lawrence, 3 Sandf. 161; Lewis *v.* Robertson, 13 Sm. & Mar. 558.

tion shall ever be demanded. The shares are or are not actually transferred, as the case may be; but whether transferred or not, they are always regarded as the property of the bank, while at the same time the direction is able to assume that all the stock has been taken and paid for. Want of consideration, it has been held, cannot be set up in suits upon such subscriptions or notes.[1] An irregularity in the organization of the corporation, whether intentional and fraudulent, or merely accidental, has also often been urged as a ground for invalidating stock subscriptions, at least so far as they have not been already paid up.[2] But *this plea cannot be sustained to the injury either of corporate creditors or of subsequent bona fide purchasers or holders of the stock*, who have taken it without participation in or knowledge of any illegality or fraud. Where there has been fraud, the maxim *in pari delicto potior est conditio possidentis* has been relied upon as a ground why the corporation could not recover. It might avail if the question lay only between the bank and the subscriber; but the corporation in such cases is not regarded as the real or exclusive party in interest. It is rather a trustee for the creditors; and they, who are therefore the real parties, are certainly not *in delicto*.

Irregular organization.

§ 670. **Neither does it relieve any one Subscriber that the Subscription of another is invalid.** — It does not on this account follow that his own subscription is invalid. Each one may be individually sued; and if he would defend, he must set up some matter going to his own individual case, and constituting a part of his own especial dealing or contract with the corporation.[1] That the corporation has been dissolved by the expiration of its charter, or by the judicial forfeiture thereof;

[1] § 669. Agricultural Bank *v.* Burr, 23 Me. 256; Litchfield Bank *v.* Church, 29 Conn. 137; Connecticut & Passumpsic River R. R. Co. *v.* Bailey, 24 Vt. 465; Blodgett *v.* Morrell, 20 id. 509.

[2] Palmer *v.* Lawrence, 3 Sandf. 161; Pine River Bank *v.* Hodsdon, 46 N. H. 114, and cases cited; Cowles *v.* Gridley, 24 Barb. 301; Johnston *v.* Southwestern R. R. Bank, 3 Strobh. Eq. 263; Minor *v.* Mechanics' Bank of Alexandria, 1 Pet. 46; McDougald *v.* Lane, 18 Ga. 444.

[1] § 670. Sagory *v.* Dubois, 3 Sandf. Ch. 466; Litchfield Bank *v.* Church, 29 Conn. 137.

or that it has ceased to act as such; or that it has stopped business, or has even gone into insolvency, — are none of them facts which suffice to remove the liability. The receiver or the trustee, or whoever else may have charge of the corporate affairs for the purpose of winding them up and settling with the creditors, succeeds to all the rights of the corporation in this respect. It is not only within his power, but it is a part of his legal duty, to enforce collections of unpaid stock subscriptions, so far as may be needful to discharge the corporate indebtedness. It makes no difference that all prior calls and instalments have been duly paid. Neither does a provision for the forfeiture of stock in case of a default in the payment of an instalment have any bearing upon this rule. It cannot supersede the obligation to pay in full, but is to be construed as cumulative.[2]

Forfeiture of stock is cumulative.

§ 671. **Subscriber cannot be released by Directors.** — To the doctrine of trust must be referred the further principle that a subscription for bank stock cannot be diminished after it is once made. So soon as it is legally complete it is an obligation from which even the directors cannot grant the subscriber any absolution, either for the whole or for any part, which will avail him as against persons who were creditors of the corporation prior to the diminution. The directors do not represent these persons, and are unauthorized to discharge an indebtedness of which they are the real beneficiaries; though as towards subsequent creditors the proceeding may doubtless be perfectly valid, if not tainted in any respect with ill-faith.[1] But the liability of a subscriber is discharged by a discharge in bankruptcy.[2]

§ 672. **The Statute of Limitations.** — The doctrine that the stock subscriptions are in the nature of a trust fund for payment of corporate liabilities seems to be well established.

[2] Sagory *v.* Dubois, 3 Sandf. Ch. 466; Lewis *v.* Robertson, 13 Sm. & Mar. 558; Bank of St. Mary's *v.* St. John, 25 Ala. N. S. 566; Thornton *v* Lane, 11 Ga. 459.

[1] § 671. Payne *v.* Bullard, 23 Miss. 88; Penobscot & Kennebec R. R. Co. *v.* Dunn, 36 Me. 501; Mann *v.* Pentz, 2 Sandf. Ch. 257.

[2] Marr *v.* Bank of West Tennessee, 4 Lea, 578.

Does not run on the liability of stockholders so long as the bank does business.

From it results the principle that subscribers cannot avail themselves of the Statute of Limitations in bar of the claims of creditors to have full payment made. For the subscribers are chargeable with the trust, and though the corporation may never have seen fit to enforce it, yet the *cestuis* do not thereby lose their rights.[1] The collection in due season by the corporation is a matter lying wholly between itself and the subscribers. The neglect of the former cannot exonerate the latter from obligations which do not run alone to the corporate body for its sole benefit, but rather continue through it, as through a conduit pipe, for the real and ultimate benefit of creditors. The corporation cannot stand between the real debtors and the real creditors, and by its *laches* continued for six years, which under such circumstances would often be voluntary and culpable, save the former from a *bona fide* liability to the latter.

The cited case of Payne *v.* Bullard,[1] however, allows the possibility of one very reasonable exception to this rule in the case where the bank ceases to elect officers and to carry on business. A contemporaneous cessation of the trust may be fairly considered as taking place, from the date of which the statute may properly begin to run. Whether the corporation itself by neglecting for six years to call for any instalment would thereby forfeit its rights to demand further payments for any other purpose than that of meeting corporate debts which the corporate assets do not suffice to pay, is a question which has never been decided. There is some authority, by analogy at least, for supposing that the Statute of Limitations would have its customary operation.[2] But the lapse of several years creates a natural presumption that the subscriptions have been paid in,[3] and therefore one who held through mesne conveyances from an original subscriber, and had had no per-

[1] § 672. Payne *v.* Bullard, 23 Miss. 88; King *v.* Elliott, 5 Sm. & Mar. 447; Arthur *v.* Commercial & Railroad Bank of Vicksburg, 9 Sm. & Mar. 430.

[2] Georgia Manuf. & Paper Mill Co. *v.* Amis, 53 Ga. 228.

[3] Agricultural Bank *v.* Burr, 23 Me. 256.

sonal knowledge of the fact that full payments had not been made, might have a reasonable and a sufficient claim to protection.

In Tennessee it has been held that against the claim upon a subscriber the Statute of Limitations begins to run when the call is made.[4]

§ 673. **Transfer by Subscriber.** — *After shares have been issued* the owner of course has the ordinary power to sell and transfer them, equally whether the whole price or only an instalment has been paid up, unless the by-laws declare otherwise. *But before this stage* has been reached, while his position is simply that of a subscriber, his privilege of transfer exists indeed, but is subject to the restriction that it will not be valid so far as to relieve him from his liability upon the unpaid balance of his subscription, unless it is assented to by the corporation, and his assignee is accepted, either directly or by sufficient implication, in his place. After such acceptance the assignor is fully relieved and exonerated from all liability on his subscription, and the assignee, by virtue of the same act, succeeds in every respect to all the liabilities, rights, privileges, and disabilities of his assignor, as herein above set forth.[1] After an issue of shares the shareholder is an owner of assignable personal property; before the issue he is only a party to a contract in which his interest can be divested only with the consent of the second contractor. Under the Tennessee bankruptcy act of 1859 an original subscriber is liable for the whole amount of his subscription, though he has assigned his stock; and it is immaterial that the bank was chartered before the passage of the act. The assignee, however, is primarily liable.[2]

§ 674. **What constitutes a Subscription.** — It has been held in New York that signature of the articles of association and writing a certain number of shares opposite the signer's name have the legal effect of, and are valid as, a subscription for

[4] Marr *v.* Bank of West Tennessee, 4 Lea, 578.

[1] § 673. Cowles *v.* Cromwell, 25 Barb. 413; Palmer *v.* Lawrence, 3 Sandf. 161; Cole *v.* Ryan, 52 Barb. 168; see also 28 Pa. St. 339.

[2] Marr *v.* Bank of West Tennessee, 4 Lea, 578 (1880).

that number of shares; and this although the document does not in terms profess to be, or to create, a contract of subscription.[1] The articles provided for in section 5 of the Act of 1864 are similar in their nature, and the cited cases form proper precedents for the determination of like questions arising in regard to them. That the organization certificate provided for in section 6 is, if not strictly a subscription in itself, at least such proof of subscription as would estop any signer from denying the fact, does not admit of a doubt.

Liability of Shareholders beyond their original Subscriptions.

§ 675. **Exists only by Contract or Statute.** — An advertisement, "Every stockholder individually responsible for all liabilities," shows a partnership.[1] Aside from cases in which the stockholders have themselves created an extraordinary responsibility, any liability of this description is the creature solely of legislation. It can arise only under the charter or under the organic law of the corporate existence. The general liability of all combined may be restricted to the single duty of paying off and redeeming all the paper of the bank which is circulating as currency at the time of the winding up of its affairs; or it may be extended to embrace the entire corporate indebtedness of every description.

(*a*) The extent of the possible liability of each individual may be unlimited, save by the amount of his proportion of the aggregate indebtedness of all; or it may be specially restricted by the proviso that it shall not exceed a certain absolute amount; as, for example, the amount of the par value of all the shares held by him. This last proviso is of frequent occurrence in banking statutes. It is often loosely expressed; but it seems that the obvious intention of the legislators will be allowed to correct the inaccuracy of their phraseology. Thus where, by the language of the act, the measure of a stockholder's liability was stated to be "the amount of his stock," a literal interpretation would

Measure of liability.

[1] § 674. Cole *v.* Ryan, 52 Barb. 168; Dayton *v.* Borst, 7 Bosw. 115.

[1] § 675. Uhl *v.* Harvey, 78 Ind. 26 (1881).

have permitted only a forfeiture of his shares. But since this must take place at any rate, and the law thus construed would be foolish and superfluous, it was held that the words should be treated as if they had read, as it was doubtless intended that they should read, "a sum equal to the amount of his stock."[2] The amount of his stock will be determined by estimating his shares at their par value, without regard to the market price.[3] A provision that the liability shall attach only when the debts exceed twice the amount of the capital stock, has been construed to signify not the nominal capital stock, but only the amount which has been actually paid in. If the debts are more than double this amount, then the stockholders will be held.[4]

(*b*) In Massachusetts the stockholders are liable for the redemption of the circulating notes, and any one who transfers his stock to avoid this liability, or who, having reason to believe the bank insolvent, transfers his stock within six months before surrender or forfeiture actually takes place, will be held; and if a loss or deficiency in the capital stock occurs by official mismanagement, the then stockholders must pay it, but the liability shall not extend beyond an amount equal to their stock. Any stockholder may compel contribution by a bill in equity.[5]

§ 676. **Statute subsequent to Organization.** — After a bank has been organized, either under a charter or under a general banking law, the legislature will have no power to create by subsequent enactment any personal liability on the part of the stockholders in excess of the loss of the money paid in by them for their shares.

A statute giving the creditors of a bank a new remedy against stockholders cannot affect those who took stock before its passage.[1] The effort in fact aims at impairing the obligation of a contract, and as such would of course be fruit-

[2] In re Empire City Bank, 18 N. Y. 199.

[3] Thornton *v* Lane, 11 Ga. 459; Lane *v.* Morris, 10 id. 162.

[4] Minor *v.* Mechanics' Bank of Alexandria, 1 Pet. 46.

[5] Pub. Stats., 682, 683.

[1] § 676. Grand Rapids Savings Bank's Appeal, 52 Mich. 557 (1884).

less. But if the charter or the organic law contains a clause declaring them subject to future alteration or amendment, then the obstacle to the subsequent creation of personal liability is removed. In that case a general law, passed for the purpose of affecting banking corporations generally, will affect all such as have been organized under a charter or a law containing this reservation. Neither will it make any difference that the articles of association distinctly assert that there shall be no personal liability; for these are valid only as they are in perfect subjection to, and accord with, all the results, direct and indirect, arising out of the law of the corporate existence.[2]

§ 677. **New Remedy to enforce an Existing Liability.** — Where laws in existence at the time of the incorporation of a bank establish a liability on the part of the shareholders to contribute ratably towards payment of its circulation in case of insolvency, there is nothing unconstitutional in the passage of subsequent laws establishing a new and more efficient means of enforcing this liability. Thus where, at the time of the insolvency, the only remedy against the shareholders was by proceedings in equity on the part of the bill-holders, and subsequently, pending the liquidation of the affairs of the bank, a new statute was passed creating the machinery of the bank commissioners, and providing a simple and expeditious means whereby they could enforce collections from shareholders, (the amount of actual liability not of course being varied,) it was held that the shareholders in the already insolvent bank could not object to the application of this new statute to their own case. It bore upon the remedy only, not upon the liability. Neither did a clause subjecting shareholders who were delinquent in meeting the assessment to pay interest at the rate of twelve per cent per annum increase their liability. For the liability was still only to pay the proportionate amount allotted to the delinquent, by which payment he could be discharged; it was strictly for his own default in non-performance of this obligation that the penalty

[2] In re Empire City Bank, 18 N. Y. 199; In re Oliver Lee & Co.'s Bank, 21 id. 9.

was imposed.[1] But Baker *v.* Atlas Bank[2] appears to curtail the liability of shareholders in a very extraordinary manner. The statute provided that if any deficiency in the capital stock should arise from the official mismanagement of directors, the shareholders at the time of such mismanagement should be liable individually to restore the deficiency. The next section made the shareholders liable, in case of insolvency of the bank, to redeem the circulation. The court appear to hold that the liability of the shareholders, in case of mismanagement, was only a liability to the bank itself, and lasted only so long as the bank continued in operation; and that, if the bank should go into liquidation by proceedings in insolvency, this liability was at once and thereby brought to an end, creditors could not enforce it either at law or in equity, and the sole liability of the shareholders would thereafter be confined to the redemption of the circulation. Baker v. Atlas Bank.

§ 678. **The Statute of Limitations upon Statutory Liability.** — The liability of shareholders to contribution for discharging the indebtedness of an insolvent bank is barred by the Statute of Limitations, and this equally whether the proceedings to enforce such liability are at law or in equity.[1] The time when the statute begins to run is a question not always easy of solution. In the first of the cited cases, which was a suit brought against shareholders to compel them to make up a deficiency in the capital stock of the bank caused by the mismanagement of the directors, it was held that the statute protected the defendants, inasmuch as the suit had not been instituted until more than six years had elapsed since the loss occurred. In the latter case, proceedings were not begun until after the lapse of six years next following the issue of a perpetual injunction against the bank, on the ground of its insolvency; and here also the shareholders were declared to be protected by the statute.

[1] § 677. Commonwealth *v.* Cochituate Bank, 3 Allen, 42.

[2] 9 Met. 182.

[1] § 678. Baker *v.* Atlas Bank, 9 Met. 182; Commonwealth *v.* Cochituate Bank, 3 Allen, 42.

§ 679. **Who is Liable as a Shareholder.** — As a general rule any person whose name is registered on the stock-ledger of the corporation as a shareholder will be held liable as such. The records in this book are *prima facie* evidence of ownership.[1] If persons have suffered their names to be entered as stockholders, though by virtue of some arrangement with the bank by which it is agreed that they shall only assume this appearance without making any payments or becoming stockholders in fact, still they will be held to all the liabilities of ordinary and regular owners for the benefit of creditors.[2] Even where directors, for the purpose of sustaining the credit of the bank, and without any ulterior motive beyond the corporate welfare, allow shares to be placed in their names simply as a cover, and because they believe that the same could not be properly purchased or owned by the bank, they will be treated as owners so far as liability is concerned. When shares have been hypothecated and placed in the transferee's name on the books, it has been said that probably both the transferrer and the transferee could be held to contribute; but that certainly the transferee could, simply because the property appears in his name.[3] But where shares have been placed in the name of a person without his consent, express or implied, and without consideration passing from him, he will be liable as a stockholder only in cases where it is shown affirmatively that he has acted fraudulently in the matter, or with the purpose of injuring the creditors of the bank.[4]

Apparent ownership binds as to creditors, unless the appearance does not arise by consent.

§ 680. One (P.) to whom stock is transferred on the books of a national bank as a pledge for a debt of the real owner becomes as to the bank and its creditors the owner of the stock. He is entitled to vote at stockholders' meetings, to draw dividends, and to transfer the stock on the books. The public is notified by the list of stockholders that he is the owner of so many shares, and he is liable to creditors even

[1] § 679. Thornton *v.* Lane, 11 Ga. 459.
[2] In re Reciprocity Bank, 22 N. Y. 9.
[3] In re Empire City Bank, 18 N. Y. 199.
[4] Robinson *v.* Lane, 19 Ga. 337.

though the loan has been paid and the stock certificate given back to the original owner, with a power of attorney to have the stock transferred to himself, but this has not been done. So long as P.'s name appears on the books of the bank as owner, unless by default of the bank itself, he is liable to the bank and its creditors as a shareholder.[1]

A transfer of national bank stock on the books appeared, "L. to D."; there were intermediate parties, K. and A.; D. was irresponsible. The receiver recovered from L., but L. failed in a suit against K.

§ 681. After failure of a national bank's London correspondent, L. sold K. certain stock, at $50 per share, and made the transfer on the bank books, leaving the name of the transferee blank. The bank failed, and then K. sold to A. for $11 per share, and filled in, not A.'s name, but that of D., who was A.'s irresponsible negro porter. So that the books stood, "L. to D. (irresp.)." The receiver disregarded the transfer, sued L., and recovered $3,579, the contribution due for the said shares. The court holding that under the national banking laws (R. S. § 5151, see Thompson on Shareholders, § 215), no transfer could be made except on the books of the bank; that no incomplete transfer could be recognized; and that a transfer to an irresponsible person could not release the person previously liable on the books. So that L. stood liable on the books. Afterward L. sued K. to recover the amount that he had had to pay; but the court held that L. could not recover: K.'s sale to A. was valid, and protected K. from liability. There was a strong dissent, however, on the ground that, where statute requires a transfer to be made on the books, there is an implied agreement that the vendee will indemnify the seller for all calls the seller is called on to pay so long as the transfer is not registered. It is the transferee's duty to put his name on the books to protect the vendor, and if he wrongfully omits this, he should be held responsible for loss resulting.[1] It is clear that the one who really should stand the loss in this case is A. As to the bank and the receiver, of course they cannot be expected to look beyond the bank books; but

[1] § 680. Moore *v.* Jones, 3 Woods, 53; Bowdell *v.* Farmers & Merchants' National Bank of Baltimore, 14 Bankers' Mag. 387.

[1] § 681. Lesassier *v.* Kennedy, 36 La. An. 539 (1884).

as between the other parties, K. should bear the loss rather than L., and A. rather than K.; each sale carried the property and all its burdens as between the parties.

§ 682. **In an Ohio Case** it was held, —

1st. After liability attaches to a stockholder it is not discharged by the subsequent assignment or transfer of his stock; but the successive assignees or holders, by accepting the stock and the benefits arising therefrom, impliedly undertake to indemnify or discharge the assignor from the liability which attached to him as stockholder while he held the stock.

2d. In a suit by creditors to enforce such liability against the stockholders of an insolvent corporation, the existing stockholders are severally chargeable with the payment of such liability.

3d. If, by reason of insolvency, the amount due from any stockholder is not collectible, the assignors of his stock up to the time the liability attached may be charged with the deficiency.[1]

§ 683. **A Colorable Transfer**, or an out and out transfer to an irresponsible person to escape liability, is not good against creditors of the bank, as where a corporation transferred its shares in a bank to one of its own clerks on the understanding that they should be retransferred on request.[1] A *purchaser* of national bank shares cannot evade liability by causing the transfer to be made to an irresponsible person.[2] Such a case differs from the following case of the pledgee in 111 United States Reports; for here the purchaser is liable as the one holding the beneficial interest.

§ 684. **The Pledgee** of national bank stock may have the stock put in the name of a third person, instead of his own, and so avoid responsibility, though gaining the security of the stock. He does not appear on the books as having been owner, and no credit can have been given

Pledgee may have transfer made directly to a third person and

[1] § 682. Brown *v.* Hitchcock, 36 Ohio, 667.

[1] § 683. Germania National Bank *v.* Case, Receiver, 96 U. S. 628; Crescent City National Bank *v.* Case, 99 U. S. 628; Bowden *v.* Johnson, 107 U. S. 251 (1882).

[2] Davis *v.* Stevens, 17 Blatchf. 259 (1879).

him, nor has he the beneficial ownership; so that the grounds of liability fail. There is a very interesting case[1] on this point, from which we quote below. The dissent does not seem to us well founded. There is no evasion of law so long as those whose names have once appeared on the books as owners are not allowed fraudulently to shake off responsibility, and the beneficial owner is held. A contract between such beneficial owner and his pledgee might be void as to creditors of the beneficial owner if the latter were in failing circumstances and the transaction constituted a fraudulent preference; otherwise, it is impossible to see how the creditors of the bank can have anything to do with such a contract, with one whose name never appears on its books.

so avoid responsibility, keeping his own name entirely from the books.

"A pledgee of shares of stock in a national bank who in good faith and with no fraudulent intent takes the security for his benefit in the name of an irresponsible trustee for the avowed purpose of avoiding individual liability as a shareholder, and who exercises none of the powers or rights of a stockholder, incurs no liability as such to creditors of the bank in case of its failure. Blumer & Co. failed in 1877, largely indebted to the Warehouse Co., which still held as security the stock standing in the name of Ferris. The failure of Blumer & Co. crippled the bank so that it never afterwards paid a dividend, and on the 15th of April, 1878, it was put into insolvency by the Comptroller of the Currency, and a receiver appointed. It is well settled that one who allows himself to appear on the books of a national bank as an owner of its stock is liable to creditors as a shareholder, whether he be the absolute owner or a pledgee only, and that if a registered owner, acting in bad faith, transfers his stock in a failing bank to an irresponsible person, for the purpose of escaping liability, or if his transfer is colorable only, the transaction is void as to creditors. National Bank *v.* Case, 99 U. S. 628; Bowden *v.* Johnson, 107 U. S. 251. It is also undoubtedly true that the beneficial owner of stock registered in the name of an irresponsible person may, under some circumstances, be

[1] § 684. Anderson, Receiver, *v.* Philadelphia Warehouse Co., 111 U. S. 479 (1884).

liable to creditors as the real shareholder; but it has never, to our knowledge, been held that a mere pledgee of stock is chargeable where he is not registered as owner. There was nothing on the books of the bank to connect M'Closkey with the Warehouse Co., and therefore no credit could have been given on account of the apparent liability of the company as a shareholder. If inquiries had been made and all the facts ascertained, it would have been found that either Kern or Blumer & Co. were always the real owners of the stock, and that it had been placed in the name of the persons who appeared on the registry, not to shield any owner from liability, but to protect the title of the company as pledgee. The avowed purpose of both transfers was to give the company the control of the stock for the purposes of its security, without making it liable as a registered shareholder. To our minds there was neither fraud nor illegality in this. The company perfected its security as pledgee without making itself liable as an apparent owner."

Dissent. — "I think if in any case between private persons one of them had placed property in the hands of minors, servants, or other irresponsible persons, for the purpose of escaping the responsibility attaching to the ownership of such property, while securing all the advantages of such ownership, it would be held to be a transaction which could not be supported on any legal or equitable principle. It does not remove this case from the control of that principle, that the parties to be injured are the unknown creditors of the bank, who are by this means deprived of the right which they have to resort to a responsible shareholder for the contribution which the law gives for their benefit. If not an actual fraud, it is a fraud upon the banking law, and was so intended to be by both the original holders of the bank shares and the officers of the Warehouse Co., by which the latter could control the shares without the responsibility which the law attaches to the owner. It is an easy device to make the right which the law gives to creditors of a failing bank ineffectual, and to evade it in all cases." The trouble with this argument is that the pledgee is not the "owner."

§ 685. **Under the Wisconsin Revised Statutes,** 1858, c. 71, it is the *shareholders at the time of suit* on the debt of the bank, not those at the time the debt accrued, who are liable to the amount of their shares,[1] and the books of the bank determine who are the shareholders. To render a buyer of shares liable, a formal transfer to him on the books of the bank must be shown.[2]

§ 686. **Liability of Estates of Deceased Stockholders.** — Executors who have invested funds of the estate in bank shares, without leave under the will or by law to do so, do not thereby make the estate liable to contribution as a shareholder.[1] Under R. S. §§ 5151, 5152, assets which have been transferred to devisees or legatees of the deceased cannot be subjected to liabilities of the bank accruing after the transfer.[2] But if the liability accrues before the actual transfer, (though the bank did not fail till after the court had ordered the legacy paid,) the assets are chargeable with an assessment on the testator's stock.

§ 687. **Necessary Preliminaries to Suits against Shareholders.** — Whether any, and if so what, proceedings are necessary, as preliminary to the suit by the creditor against the stockholder, is a matter concerning which the authorities are not wholly uniform. In California the stockholders of a commercial bank are simultaneously and co-ordinately responsible with the corporation.[1]

And in Missouri it has been held that, upon failure of the bank, the owner of a certificate of deposit may sue a stockholder without any previous demand on the bank.[2] But the better principle seems to be, that recourse should first be had to the corporation, and that some evidence of the incapacity of the corporation to meet the demand should be furnished before the right of action against the individuals will ac-

[1] § 685. Cleveland *v.* Burnham, 55 Wisc. 598 (1882).
[2] Cleveland *v.* Burnham, 64 Wisc. 347 (1885).
[1] § 686. Diven *v.* Lee, 36 N. Y. 302.
[2] Witters *v.* Sowles, 32 Fed. Rep. 130.
[1] § 687. Mitchell *v.* Beckman, 64 Cal. 117 (1883).
[2] Hodgson *v.* Cheever, 8 Mo. App. 318 (1880).

crue.[3] Such recourse would naturally take the form of a suit at law against the bank; and such evidence could scarcely take a better form than a return of *nulla bona* made by the sheriff upon an execution issued against the corporate property. Though, of course, any evidence which simply *tends* to show a total want of assets on the part of the bank must be open to rebuttal by positive proof of the existence of such assets.[4] In ordinary cases, so long as there are assets which have not been divided among the creditors, the shareholders cannot be looked to. A dividend consuming the whole property ought first to be declared, and it will be no excuse for a suit brought before its declaration that it has been postponed indefinitely for the purpose of preventing a sacrifice of the property. It is to be inferred from the cited cases, that such postponement is improper. The creditors are entitled to immediate payment, and cannot be held to wait, perhaps for years, until the parties having charge of the assets have brought them into a condition to be advantageously turned into money. The difficulty of disposing of them at once, in order to excuse the failure to do so, must be something verging upon temporary impossibility. But in that case the right of the creditor to immediate payment will be regarded as paramount to the right of the stockholder to have the assets first exhausted. The court may then order an apportionment of the corporate debts among the shareholders. For it is just that, if any such inevitable delay is to be encountered in winding up the affairs, the hardships induced by it should be borne rather by the parties who owe, than by those to whom the debt runs.[5]

Existing assets should first be divided.

Unless it would be very disadvantageous.

Georgia, Alabama. — But, upon the other hand, it has been held in Georgia, where this whole matter has been the subject of much litigation, that when the statute makes both directors and shareholders liable, the liability will, in the absence of distinct language to the contrary, be joint, and not several;

[3] Grew *v.* Breed, 10 Met. 569; Cochituate Bank *v.* Colt, 1 Gray, 382.

[4] Payne *v.* Bullard, 23 Miss. 88; Hewett *v.* Adams, 50 Me. 271; 54 id. 206; Thornton *v.* Lane, 11 Ga. 459; Harris *v.* Lane, 16 id. 217.

[5] In re Reciprocity Bank, 29 Barb. 369; 22 N. Y. 9.

and the liability of the shareholders will be primary and original, and not secondary and collateral to that of the directors; and will not require that of the directors to be first resorted to.[6] Again, in Alabama, it was held that the holders of the circulating notes or bills of a foreign banking corporation, which had become insolvent, might bring their bill in equity, charging fraud and seeking a discovery and an accounting, making the directors, stockholders, and agents of the company respondents, without first obtaining a judgment at law.[7] This case, however, is somewhat beside the precise question: and the Georgia cases can hardly be allowed to overrule those cited to sustain the doctrine of the preceding paragraph, which is also fortunate in having the support of sound reason in addition to judicial authority. Only one remark, in the cited case of Lane *v.* Morris, is worthy of note. It is to the effect that the liability of the stockholders cannot be enforced by the receiver or assignee of the corporation, since it constitutes no part of the assets of the bank. The rule seems to be sound, and in the absence of statutory provision to the contrary, it must be regarded as clear that the suit should be brought directly by the creditor against the stockholder. But though this draws after it the corollary that the right of action against the shareholder is independent of that against the bank, it is far from implying that the two suits may be prosecuted contemporaneously, or that the one against the shareholder may precede the other.

Creditor, not receiver, must sue stockholder.

§ 688. **Judgment against the Bank does not conclude a Stockholder.** — Even in cases where a judgment has been actually recovered against the bank, it does not absolutely conclude a shareholder. If an effort is made to levy the execution issued under such judgment upon his property, he will be allowed to bring his writ of error to obtain a reversal. For though he was not strictly and technically a party to the suit, and would not even have been allowed to appear and defend it, though his

[6] McDougald *v.* Lane, 18 Ga. 444; Robinson *v.* Bank of Darien, 18 id. 109; Robinson *v.* Bealle, 20 id. 275; Lane *v.* Morris, 8 id. 468; Belcher *v.* Wilcox, 40 id. 396; Jones *v.* Wiltberger, 42 id. 575.

[7] Bank of St. Mary's *v.* St. John, 25 Ala. 566.

private property had been attached in it,[1] yet his interest in its result and his personal liability thereby entailed make him privy to it; and justice requires that, since the proceedings did not profess to conclude him personally, and did not directly summon him as a defendant to attend to and contest it, he should have the opportunity afterwards to be heard before his property is taken from him.[2] A judgment against the bank is *prima facie* evidence of liability of the stockholders.[3]

§ 689. **Interest.** — In Georgia it has been held that where the stockholder is sued by the holder of circulating bills of the bank, interest upon the amount of the bills can be recovered only from the date at which demand of payment was made upon the defendant individually, and not from the time of demand upon the bank.[1] But in Massachusetts it has been held that a stockholder is not liable to pay any interest at all on bank-bills.[2]

§ 690. **Defences in Suits against Shareholders.** — It is not sufficient for the plaintiff to allege in his suit against the shareholder that he is under a liability to pay. An actual consideration must have passed from the plaintiff. Thus, if his suit be upon the bills of the bank, he must be the holder of them for value; and this not only to bring him within the above rule, but also because unless he holds the bills, and is therefore in a position to surrender them, and so to prevent future suits and recoveries upon these identical bills, he cannot be allowed to have judgment against the stockholder. For the stockholder is entitled to this protection no less than the bank itself, in whose place, so far as the redemption of the bills in question goes, he will stand by virtue of his payment of them.[1] The obligation of the bank is only to redeem upon presentation and surrender, or proof of actual destruction of specific and described bills, and his obligation

[1] § 688. Whitman *v.* Cox, 26 Me. 335; Merrill *v.* Shaw, 38 id. 267.

[2] Rankin *v.* Sherwood, 33 id. 509.

[3] Grand Rapids Savings Bank's Appeal, 52 Mich. 557 (1884).

[1] § 689. Lane *v.* Morris, 10 Ga. 162.

[2] Crease *v.* Babcock, 10 Met. 525; Grew *v.* Breed, id. 569.

[1] § 690. Pollard *v.* Stockholders of Kentucky Exporting Co., 4 J. J. Marsh. 52.

cannot be extended in excess of that of the bank, whose default alone he is to make good. If the stockholder can show that as a matter of fact the directors, in creating or permitting the indebtedness for the discharge of which a contribution is sought, exceeded their proper authority, and that the creditor then knew or ought to have known that their action was thus beyond their powers, he will establish a good and sufficient defence as towards this creditor.[2] For though the shareholders make the directors their general agents, still the functions of those agents are matter of custom and of common knowledge. If they stretch their powers to the execution of acts beyond the scope which ordinary custom has marked out as appurtenant to their office, they will bind their principals only provided that they have been invested with a real extraordinary authority, or have been clothed with such a semblance of it that the injured party was naturally deceived, without ignorance or other species of default upon his own part. But for their wrongful acts within the scope of their powers, as by the over-issue of bills for circulation, the shareholder will be liable to any innocent creditor who became such by virtue of the wrongful act, but without knowledge of it.[3]

Ultra vires known to creditor.

§ 691. **Set-off.** — Where one is a creditor as well as a stockholder, he cannot avail himself of the debt owing to him by the bank by way of set-off to diminish his contributory share.[1] His liability as a contributor for the benefit of creditors must be distinguished from his character as a simple contract debtor to the bank upon ordinary business transactions. In the latter case, we have seen that he enjoys the right of set-off even when his claim is based only upon the circulating paper of the corporation. But a stockholder having by assignment a judgment in favor of a noteholder may set it off against his liability.[2]

[2] Leavitt *v.* Yates, 4 Edw. Ch. 134.

[3] McDougald *v.* Bellamy, 18 Ga. 411; Grew *v.* Breed, 10 Met. 569.

[1] § 691. Garrison *v.* Howe, 17 N. Y. 458; In re Empire City Bank, 18 N. Y. 199.

[2] Marr *v.* Bank of West Tennessee, 4 Lea, 578 (1880).

§ 692. **Contribution.** — A stockholder who has paid a judgment in a suit against him on his individual charter liability may enforce contribution.[1]

If the plaintiff is shown to have been an officer of the bank, and to have been guilty of malversation in office, he will be able to make out no case for contribution against a shareholder who proves these facts.[2] In like manner, one who, though not an officer, has yet taken part in the illegal organization of the corporation, will not be allowed to sustain a suit against a shareholder, even though his debt is of so favored a nature as the circulating bills of the bank.[3] When the liability of the shareholders is confined to the redemption of the circulating paper, they cannot be held to contribute for the redemption of bills in the hands of one who took them from the bank simply as security, and upon the especial agreement that they should be held by him as such, and should not be put in circulation.[4]

No contribution to guilty officer.

§ 693. **Nature and Extent of the Remedy against Shareholders.** — The capital stock of the bank is, of course, primarily liable for the debts of the bank. But where the capital of the bank is divided and paid back, in whole or in part, to the shareholders, the amount may be followed into their hands by unsatisfied creditors of the corporation, even though the statute of incorporation protects the shareholders from personal liability for the indebtedness.[1] General principles would lead, without doubt, to the conclusion that the creditors ought properly to seek their remedy against the shareholders in equity, unless the phraseology of some especial statute should authorize a divergence from these principles. Clearly the creditors ought to share equally the funds which must be contributed by the shareholders. But if any single creditor can sue any single shareholder, great inequality will necessarily be produced, an immense number

Suit should be in equity.

[1] § 692. Wincock *v.* Turpin, 96 Ill. 135 (1880).
[2] McDougald *v.* Bellamy, 18 Ga. 411.
[3] Robinson *v.* Lane, 19 Ga. 337.
[4] Johnston *v.* Southwestern R. R. Bank, 3 Strobh. Eq. 263.
[1] § 693. Wood *v.* Dummer, 3 Mason C. C. 308.

of suits will be instituted, and the temptation will be great for fraudulent arrangements between individual creditors and those among the shareholders who are more easily come at to be sued, and who are more likely to be solvent when the judgment is obtained. Multitudes of the smaller creditors, and probably those who are least able either to lose the money or to take the necessary means for recovering, and who therefore most need the protection of precisely such legislation, would be practically ousted of the relief which the statute would pretend to provide. But proceedings in equity would render the remedy thorough and equal, and in every respect what it ought to be and what it assumes to be. The bill, as is customary in proceedings of a similar character, should be brought either by all the creditors, or by one or more creditors for the benefit also of all such as should afterwards seek to come in and bear their proportion of the expenses. This method has been adopted in Massachusetts, Maine, and Wisconsin.[2] It has also been approved as a proper method in New York;[3] although in this State it has been held that a suit at law will lie in favor of a single creditor against a single shareholder.[4] And it has been said in the Circuit Court of the United States for the First Circuit, concerning a bank in Maine, that a bill may be maintained by some only of the bill-holders against some only of the shareholders, the strict rule being dispensed with by reason of the practical impossibility of getting all before the court.[5] The suit at law seems to be recognized as the proper, or at least as a sufficient, course in Rhode Island,[6] Indiana,[7] and Georgia.[8]

Suit at law.

[2] Harris *v.* First Parish in Dorchester, 23 Pick. 112; Crease *v.* Babcock, 10 Met. 525; Grew *v.* Breed, 10 Met. 569; Coleman *v.* White, 14 Wisc. 700; Wiswell *v.* Starr, 48 Me. 401; Baker *v.* Atlas Bank, 9 Met. 182.

[3] Slee *v.* Bloom, 19 Johns. 456; Briggs *v.* Penniman, 8 Cow. 387.

[4] In re Hollister Bank, 27 N. Y. 393; Bank of Poughkeepsie *v.* Ibbotson, 24 Wend. 473.

[5] Wood *v.* Dummer, 3 Mason, C. C. 308.

[6] Atwood *v.* Rhode Island Agricultural Bank, 1 R. I. 376.

[7] Wright *v.* Field, 7 Ind. 376.

[8] Harris *v.* Lane, 16 Ga. 217; Jones *v.* Wiltberger, 42 id. 575.

And in Illinois it is said, that where the charter of a bank makes the stockholders individually liable to the depositors, the remedy must be pursued at law, not in equity; and the action may be had against a single stockholder.[9] Though in the first two States named the language of the statute, rather than any rule of law or principle of justice, appears to be at the bottom of the decisions; and in Rhode Island the court particularly remarked that the subject was eminently proper for equity jurisdiction. The Indiana case further holds that, though the shareholders are liable "individually," still it is perfectly proper to join any number of them in one and the same suit as co-defendants. It would seem that equity must always be able to exercise jurisdiction; but further than this, the equitable jurisdiction ought to be exclusive. Where the proceedings are by bill in equity, it is obvious that actual personal notice often cannot be given to all the shareholders. Their names and addresses may not always be correctly discoverable from the stock-ledger. Even when the names of foreign shareholders are known, still the court may not be able to acquire such jurisdiction over them as will suffice to enforce their obligation to contribute. But by reason of the natural notoriety of such a matter among those who are so nearly interested, and by reason also of the utter impossibility of otherwise securing the ends of justice, it has been held that notice to foreign holders may be sufficiently made by publication in the public newspapers.[10] Each respondent will be allowed to file his separate answer, and to contest the case independently of the rest.[11]

§ 694. **Extent of Liability.** — The liability of each stockholder is precisely for his ratable proportion of the sum total of that indebtedness of the bank which is to be borne by the shareholders, whether this be its entire indebtedness of every description, or only its indebtedness upon its circulating bills and notes. After he has once paid this proportional amount

[9] Meisser *v.* Thompson, 9 Ill. App. 368 (1881).

[10] In re Empire City Bank, 18 N. Y. 199. See also Diven *v.* Lee, 36 N. Y. 302.

[11] Wiswell *v.* Starr, 48 Me. 401.

to any person or persons having a legal right to demand it from him, he is fully acquitted and discharged. His liability is for his share of the total indebtedness, not for his proportion of each item of that indebtedness. Neither are the solvent shareholders, or those who can be come at for collection, liable to assessment beyond the proportional amount above described, by reason of the insolvency or inaccessibility of others of the shareholders. Those who are solvent and accessible have not the burden of paying off the whole sum which is due from all together, but only their own proportionate shares It is the same if the bank owns shares of its own capital stock. In assessing the other shareholders, the calculation will be made upon a basis including these shares precisely as if they were held by any outside party.[1] Making an equation according to the time-honored rule of three, the liability of each individual may be thus ascertained: As the *whole capital stock* is to the *entire indebtedness* which all the shareholders are liable to discharge, so is the *total par value of all the shares owned by any one shareholder to his proportion of the amount to be redeemed.* The last figure gives the sum which the individual is liable to pay.

Determination of the total liability of each shareholder.

To ascertain the extent of the liability of a shareholder, S., in a suit by a bill-holder, take the whole amount, T., of bills of the bank for which the stockholders were liable; then, if S. owns one tenth of the stock of the bank, his total liability will be one tenth of T. less the amount of bills he has already paid before this suit.[2]

§ 695. **Claims bought at a Discount.** — A creditor who buys claims at a discount can only recover what he paid in a suit against a stockholder on his charter liability.[1] A director sued as stockholder cannot be allowed credit for the face

[1] § 694. In re Hollister Bank, 27 N. Y. 393; Hollister *v.* Hollister Bank, 2 Keyes, 245; Harris *v.* Lane, 16 Ga. 217; Robinson *v.* Bank of Darien, 18 id. 65; Robinson *v.* Lane, 19 id. 337; Wiswell *v.* Starr, 48 Me. 401; Atwood *v.* Rhode Island Agricultural Bank, 1 R. I. 376.

[2] Branch *v.* Baker, 53 Ga. 502 (1874).

[1] § 695. Gauch *v.* Harrison, 12 Ill. App. 457 (1883).

value of claims against the bank that he has bought at a discount after its failure.[2]

§ 696. **Who can sue Shareholders.** — In whose favor the right of action against the shareholders exists must depend upon the nature of the collection which is to be enforced. If the demand is for further *instalments upon subscriptions* for shares of the capital stock, the *receiver or trustee*, or other legal representative of the corporation, who has succeeded to its rights, has the exclusive power to sue. For the sums thus owing are simply debts to the corporation, constituting a portion of its assets, which its representative and successor not only has the right, but is under the obligation, to collect for the purpose of discharging the indebtedness. But *if the demand is for further contribution beyond the amount of the par value* of the shares already paid or due under the original subscriptions, then it would seem that, *unless the statute* expressly makes the sums thus contributed assets of the corporation, and *directly gives the right of collection to the receiver or trustee*, the *suit should properly be brought by the creditors* whose claims are to be paid out of the proceeds. It is their sole and peculiar right, which they are at liberty to enforce when they please, or altogether to forego. There seems to be no ground upon which any other person could sustain suits of this description, and hence it has been regarded as proper for the creditors themselves to bring them.[1] In *Maine*, however, the rule is *different.* There a receiver is allowed to sustain a bill in equity against all the shareholders to enforce contribution. But if he is himself a shareholder, or has been one at any previous time, so that he

Outside creditors may sue; also receiver, if authorized. But one stockholder cannot sue another on his statute liability.

[2] Holland *v.* Heyman, 60 Ga. 174 (1878).

[1] § 696. See Lane *v.* Morris, 8 Ga. 468; Atwood *v.* Rhode Island Agricultural Bank, 1 R. I. 376. In this case it is true that the receiver had stated in an answer filed in court that he did not deem it to be his duty to levy contributions upon the shareholders. But apparently the court was of the same opinion; at any rate it expressed no disapprobation of his views, and simply sustained the direct and immediate right of action by the stockholders without comment.

is himself liable to contribute, his bill will not lie, since then he would be both a complainant and a respondent.[2]

As to claims against the bank, the stockholders are as partners and cannot sue each other at law. The statute liability of stockholders is for the benefit of creditors of the bank, which last at bottom consists of the stockholders, and not for the benefit of these stockholders themselves; and they cannot by becoming creditors of the bank, and suing each other back and forth, avoid the liability to outsiders, and thus render the statute security worthless. If A. holds one thousand dollars of stock and the bank owes him one thousand dollars, and B. is another stockholder in the same position, if A. sues B. on his liability as a stockholder and B. sues A. in the same way, the statute liability of each is exhausted inside the bank, and never avails the real creditors of the institution. This will not be allowed.[3]

§ 697. **Lien upon Shares for Holder's Indebtedness to Bank.** — *No lien* exists at *common law* upon the shares of a shareholder who is indebted to the bank.[1] But it is often sought to be established, either by legislative enactment, by charter provision, or by embodiment in the articles of association or in the by-laws. It may also exist by virtue of a usage of the particular bank; but it will be valid then only as against shareholders who have notice of it, and their assignees, who also have notice or else who take without valuable consideration.[2] If there is a *usage* not to allow transfer while the holder owes the bank, and a stockholder *knowing* this borrows of the bank, the lien is good against him or his assignee in insolvency.[2]

Usage.

§ 698. **By-Law Lien.** — Any of the above methods are sufficient, with the exception of the attempt to establish it by by-laws. Concerning this, it has been held that the subject is not one which it is competent for the corporation to control

[2] Wiswell *v.* Starr, 48 Me. 401; Hewett *v.* Adams, 50 id. 271.

[3] Meisser *v.* Thompson, 9 Ill. App. 368; Bailey *v.* Bunker, 2 Hill, 190.

[1] § 697. In the absence of statute, contract, by-law, or usage, no lien exists. Farmers & Merchants' Bank *v.* Wasson, 48 Iowa, 336.

[2] Morgan *v.* Bank of North America, 8 Serg. & R. 73.

by a by-law. Its importance requires more formal treatment. Such by-law, however, may be good as a contract, and will even affect third parties who have notice of it, and of the fact that the stockholder owes the bank at the time of transfer. But where a by-law provided that no transfer of stock should be made by one indebted to the bank, and that the certificates should contain notice of the provision, but in fact they did not, one who took stock without notice of the by-law or of the debt of the transferrer was held to have a lien paramount to that of the bank.[1]

A by-law creating a lien (unless forbidden by the organic law) is good against the stockholder himself, or a transferee with notice.[2] But how far it will stand against a transferee without notice is doubtful.[3] On principle, it would seem that, as a corporation cannot deprive a stockholder of his common law property rights without either his consent or power given in the charter, such a by-law lien (unauthorized) could be good only as a contract; that a stockholder borrowing of the bank after knowing the by-law impliedly consents to it, as one of the conditions the bank has announced as the basis upon which it will loan to stockholders, and when the stockholder is himself thus held, his transferee with notice can have no better right; but a transferee without actual notice, since stock is held to be negotiable, cannot be affected, unless the by-law is constructive notice and puts him on inquiry. In the interests of justice and fair dealing it might be well that third persons should be held bound by what the by-laws would reveal in regard to matters which evidently may be affected by them either as by-laws or as contracts, though authority as to the matter of notice to strangers by by-laws is rather against this view; but if the transferee has no notice of the existence of any debt from the stockholder to which the lien could

[1] § 698. Bank *v.* Pinson, 58 Miss. 421 (1880).

[2] McDowell *v.* Bank of Wilmington, 1 Harr. (Del.) 27; Tuttle *v.* Walton, 1 Ga. 43.

[3] Plymouth Bank *v.* Bank of Norfolk, 10 Pick. 454; Morgan *v.* Bank of North America, 8 Serg. & R. 73; McDowell *v.* Bank of Wilmington, 1 Harr. (Del.) 27.

apply, then on the principles of negotiability the vendee would hold against any mere contract, and the lien would have to derive its force from statute law in order to affect him.

§ 698 A. **Provision for a Lien in the Articles of Association.** — The associates have the power to include such a provision in their articles of association, but it is not to be assumed that what they can thus dispose of they can by the same articles determine to dispose of in by-laws or through the action of the directorial board. The same rule, which was first laid down concerning corporations established under the New York State law, has since in the same State been extended to corporations organized under the National Banking Act of 1864.[1] But a contrary doctrine has been asserted by the Supreme Court of the United States, and in divers of the State courts, concerning the national banks.[2] And the latter is clearly correct. Such a lien would be inconsistent with the manifest intent of the National Banking Act, in prohibiting national banks from loaning on the security of their own stock. (II. §§ 35, 135.)

§ 699. **Transfer in Derogation of Lien.** — (*a*) An attempt to make a transfer in derogation of a valid lien of this nature is of no effect as against the bank. The lien is not impaired, and the transfer can be good only as between the parties, until such time as the indebtedness is discharged. In the mean time the strict, and doubtless the correct rule, would permit, and might oblige, the bank to recognize only the transferrer as the holder of the shares.[1] For he has had no right as towards the bank to divest himself of the ownership, and it might be dangerous for the bank itself if it should lay

[1] § 698 A. Bank of Attica *v.* Manufacturers & Traders' Bank, 20 N. Y. 501; Leggett *v.* Bank of Sing Sing, 24 id. 283; Arnold *v.* Suffolk Bank, 27 Barb. 424; Rosenback *v.* Salt Springs National Bank, 53 id. 495; Conklin *v.* Second National Bank, id. 512. But *semble* that, if the articles of association provide that such a lien may be established, a by-law, made in pursuance of such articles and establishing the lien, would be valid. Rosenback *v.* Salt Springs National Bank, *supra*.

[2] See *post*, in the part on the National Banking Act.

[1] § 699. Bank of Utica *v.* Smalley, 2 Cow. 770.

itself open to the charge of having ratified the transfer and waived its lien by recognizing the transferee as the owner. If it should so recognize him for any especial purpose, care should at least be taken expressly to reserve the lien.

(*b*) In England an organic act gave to the corporation a lien on shares for indebtedness of the holder to the corporation, and the certificates of stock recited this fact. A holder transferred his certificates to his banker as collateral security. It was held that the corporation could enforce its lien on the shares, even to cover indebtedness of the shareholder which had accrued after the corporation had received notice of the pledge of the certificates to the banker.[2]

Transfer only on books.

(*c*) It is a general, perhaps it may be considered a universal rule, with banks which claim the right to enforce a lien of this nature, that no transfer of shares can be made which shall be valid as towards the corporation itself save upon the corporate books. Such rules, duly established by legislative or directorial action, will be sustained by the courts, and no transfer of any other description which the parties may make between themselves will bind the bank. The assignee in any such contract will take only an equitable right to the shares, incumbered with all the liens which had become fastened upon them in the hands of the assignor. This is the case equally whether the assignee had or had not notice, at the time of the transaction, of the rights or the claims of the bank.[3]

No lien for debt of assignor created subsequent to notice of assignment.

(*d*) But it has been declared that the bank is bound to give effect to an equitable assignment of which it has notice to this extent: that it can no longer regard the shares as security for any subsequently created indebtedness of the assignor. They are available only upon his debts which have already arisen. But for debts of the assignee the bank may thereafter enforce a lien which will be perfectly valid, though the transfer has not been made,

[2] Bradford Banking Co. *v.* Briggs, 31 Ch. D. 19.

[3] Union Bank *v.* Laird, 2 Wheat. 390; Farmers' Bank *v.* Iglehart, 6 Gill, 50; Brent *v.* Bank of Washington, 10 Pet. 616; Reese *v.* Bank of Commerce, 14 Md. 271; Klopp *v.* Lebanon Bank, 46 Pa. St. 88.

and which will only be secondary to the lien for the assignor's debts.[4] But it must be confessed that this rule, which has only been enunciated in one Western court, does not seem wholly satisfactory. Another ruling, which, though somewhat similar, yet avoids the unsatisfactory element in the preceding case, and is certainly less open to criticism, asserts that, if the bank has notice that the shares are held only in trust by the nominal owner, it can thereafter hold them to secure the indebtedness of the *cestui*, and of him alone.[5]

(*e*) But the bank has a lien upon dividends, or more properly it may set off dividends accruing upon the shares of a stockholder against indebtedness of the stockholder to the bank. For the dividend is a simple debt owing from the corporation to the shareholder.[6]

Lien on dividends.

§ 700. **Bank postponed as to the Debtor's other Property.** — When a bank has applied the whole proceeds of stock to payment of the holder's debt, it is postponed as to his other property until his other creditors have been made equal out of the general estate, and then the residue will be distributed *pro rata* among all the creditors. A charter lien is only entitled to a preference similar to that allowed to partnership over individual creditors.[1]

§ 701. **Waiver and Loss of Lien.** — *If the bank suffers the transfer to be made upon its books, without the express stipulation* that the shares shall still be held by the assignee subject to the lien for the then subsisting indebtedness of the assignor, *it will amount to a waiver of the lien.*[1] Even though the Pennsylvania bank law of 1850, § 10, forbids a stockholder to transfer on the books of the bank so long as he is indebted to the bank, yet the bank may waive the right[2] by the act of an officer impliedly authorized to make the

[4] Conant *v.* Seneca County Bank, 1 Ohio St. 298.

[5] Mechanics' Bank of Alexandria *v.* Seton, 1 Pet. 299.

[6] Hagar *v.* Union Bank, 63 Me. 509.

[1] § 700. German Security Bank *v.* Jefferson, 10 Bush, 326 (1874).

[1] § 701. Sewall *v.* Lancaster Bank, 17 Serg. & R. 285; Rogers *v.* Huntingdon Bank, 12 id. 77.

[2] Cecil National Bank *v.* Watsontown Bank, 105 U. S. 217 (1881).

transfer, and the assignee will then obtain complete title. But where the act is less direct and unquestionable, the presumption must always be that no waiver was intended. The president and directors may be admitted to testify that they never designed to waive. Where the certificate of shares states that they are transferable at the bank, or only at the bank, both expressions being of the same force,[3] personally or by attorney, on the surrender of the certificate, there is nothing in this language which intimates a waiver or abandonment of lien, or of the right to refuse a transfer so long as the person to whom this certificate was issued remains indebted to the bank.[4] If there is any indorser or guarantor for the shareholder's indebtedness, the bank may at any time demand and receive further security from him without in any way infringing or affecting its right of lien.[5] A statutory prohibition, forbidding the bank to loan on the security of its own stock, only forbids it to take such shares directly in pledge, and is not intended to affect the general statutory lien and loans which may be made in reliance thereon.[6] The lien is appurtenant to the indebtedness, and not to the remedy. Whence it follows that, though the right of action at law may have been barred, and the remedy lost by the running of the Statute of Limitations, still, the indebtedness not being thereby discharged, the lien subsists. The two are coexistent.[7]

Further security no waiver.

The lien is not affected by the Statute of Limitations.

§ 702. **For what Indebtedness the Lien attaches.** — The nature of the indebtedness, whence or how arising, is a matter of no consequence as regards the attaching of the lien.[1] But whether the lien will attach to secure indebtedness which has not actually matured at the time when a

Immature debt.

[3] Williams *v.* Mechanics' Bank, 5 Blatchf. C. C. 59.

[4] Union Bank *v.* Laird, 2 Wheat. 390; Hill *v.* Pine River Bank, 45 N. H. 300; Reese *v.* Bank of Commerce, 14 Md. 271.

[5] Union Bank *v.* Laird, 2 Wheat. 390. See § 704.

[6] Vansands *v.* Middlesex County Bank, 26 Conn. 144.

[7] Farmers' Bank *v.* Iglehart, 6 Gill, 50.

[1] § 702. Rogers *v.* Huntingdon Bank, 12 Serg. & R. 77; Mechanics' Bank *v.* Earp, 4 Rawle, 384.

demand for transfer is made, is a question concerning which the courts are not all agreed, though a decided preponderance is observable. In Maryland it has been decided in the negative.[2] But the current of authority seems to tend the other way.[3] Certainly it seems reasonable that the lien should secure indebtedness which has not fully matured; otherwise, a large portion of the good which is sought to be accomplished by it must be wholly annulled. The bank, knowing itself to be entitled to such a lien, may fairly be supposed to rely upon it in allowing the indebtedness to be assumed originally, and would be justified in regarding it as a valuable contribution towards perfect security, on the faith of which the directors may not improperly neglect to demand such strong additional safeguards as they are wont. Further, if the lien does not apply to immature indebtedness, what is to prevent the grossest frauds by the debtor? He cannot be legally opposed, if, with the express purpose of stripping the bank of all possible means of repaying itself, and knowing that he will not and cannot himself pay it, he transfers all his shares upon the very day before his note to the bank is to fall due. Such rulings as that of the Maryland bench obviously operate only to impugn the wisdom of granting any such lien at all, by robbing it of nearly all its value.

§ 703. **Subrogation of Surety to Bank's Lien.** — The lien is primarily for the benefit of the bank. But if the principal debtor furnishes sureties or guarantors upon the debt, and they pay the amount to the bank, they will then be subrogated to all the rights of the bank. They will be entitled to avail themselves of the lien, and the bank will owe to them the duty of refusing to allow a transfer of the shares, and must not suffer a waiver or loss of the security by any other means, until they have been reimbursed. After payment by them, the bank in fact becomes a trustee for them, for the purpose of doing whatever may be necessary to retain and secure the

[2] Reese *v.* Bank of Commerce, 14 Md. 271.

[3] Leggett *v.* Bank of Sing Sing, 24 N. Y. 281; Grant *v.* Mechanics' Bank of Philadelphia, 15 Serg. & R. 140; Sewall *v.* Lancaster Bank, 17 id. 285.

lien for their benefit.[1] The rule that the surety is entitled to the benefit of all the creditor's securities has been carried so far in respect to liens upon bank shares, that it has been held that the bank has no right to appropriate or shift the lien for the purpose of covering a new demand, with the effect of leaving the debt on which the surety is liable either unsecured or imperfectly secured.[2]

(*a*) **Lien on Shares of a Partner.** — The lien will attach upon bank shares, which are the private and separate property of one of the partners in a firm, to secure a debt due from the firm.[3]

§ 704. **Cancellation of the Lien by other Security.** (See § 701.) — It does not prevent the lien from attaching, or the bank from refusing to permit a transfer, that the deposit account of the debtor is greater than the amount of his indebtedness. The bank is under no obligation to look to the deposit account before or in preference to the stock. But it seems that if the shareholder offers ample security for the debt, and the bank still refuses with unreasonable strictness to permit the transfer, the shareholder will then have a right of action against the bank for the refusal.[1] This is intimated in the cited case; but it was, strictly, an *obiter dictum*, and there seems to be some reason for doubting by what right the courts could compel the bank to exchange, or punish it for refusing to exchange, a security of a peculiar nature, which the law has either directly given to it, or has allowed it by its own action to secure, and to take in its stead another species of security, which, though it may appear equally valuable and sufficient, may yet for divers reasons be less acceptable to the directors. But if the bank assents to accept other security, the lien will be thereby discharged, unless the contrary understanding be affirmatively proved.[2]

Tender of other security.

[1] § 703. Klopp *v.* Lebanon Bank, 46 Pa. St. 88.
[2] Kuhns *v.* Westmoreland Bank, 2 Watts, 136.
[3] Mechanics' Bank *v.* Earp, 4 Rawle, 384.
[1] § 704. Mechanics' Bank *v.* Earp, 4 Rawle, 484.
[2] McLean *v.* Lafayette Bank, 3 McLean, 587.

§ 705. **The Lien affects the Shares as a whole.** — Though the value of the shares may far exceed the amount of the debt, still the debtor is not entitled to demand an apportionment. The lien affects them as a whole, and not only what may appear to be, or may really be, a sufficient part of them. The bank is therefore entitled to refuse any transfer whatsoever, without regard to comparative values or amounts.[1]

§ 706. **Shareholder's Right to Surplus Assets.** — Any surplus which may remain, after the payment of all corporate debts, in the hands of the assignee, trustee, receiver, or other person who has had the corporate property committed to his charge for the purpose of winding up its affairs, belongs to the shareholders. They are entitled to have it apportioned among them according to the number of their respective shares. The trust is first for the discharge of the indebtedness of the bank, and next for a division of the remaining assets among the corporators. For this reason, and also because of the number of persons interested, a bill in equity may properly be brought against the trustee demanding that he account and that he collect and distribute the surplus property. Though if it should happen that an apportionment has already been made, and that only payment in accordance with it is sought, then each individual shareholder might maintain his own action at law for the collection of the sum due to him, like any other action for simple debt.[1] But the ownership of shares, or the payment of a contributory share under the apportionment for the payment for corporate debts, does not render the shareholder a creditor of the corporation, or entitled to any dividend out of its assets till all the proper indebtedness has been discharged in full.[2] Not even if the shareholders have been assessed upon the basis of an undervaluation of the corporate assets can they have any dividend

[1] § 705. Sewall *v.* Lancaster Bank, 17 Serg. & R. 285.

[1] § 706. Bacon *v.* Robertson, 18 How. (U. S.) 480; Smith *v.* Snow, 3 Mad. C. C. 310.

[2] Hollister *v.* Holister Bank, 2 Keyes, (N. Y.) 245; Coulter *v.* Robertson, 24 Miss. 278.

returned to them so long as there are creditors of the corporation remaining unpaid.[3]

§ 707. **Shareholder's Right to New Shares.** — Where there is an increase of the original amount of the capital stock of the bank, and new shares are created to represent it, those who are shareholders at the time of the creation have the first right to subscribe, in the proportion of their original shares, for the new ones, before these can be offered generally.[1] Nor can they be deprived of this right by the board of directors; but if they be deprived of the privilege by the action of the board, they or any of them may sue the corporation by special count in assumpsit, and recover, by way of damages, any premium the shares might be worth above par.[2] But where the full amount of the original capital stock has never been subscribed for, and the full number of shares thereof has never been issued, the case is different. If the directors then see fit to accept or solicit subscriptions for the shares remaining untaken, they are not obliged to give to those who are already shareholders any preference, but may offer the fresh shares in open market.[3]

§ 708. **Shareholder's Rights in Dividends.** — Dividends are only payable to the shareholder on demand; and accordingly he has no right of action against the bank to recover them until after demand has been made for them, and made for them at a time when the shareholder has a right to have them paid. If he make the demand when the bank is rightfully retaining the dividend in set-off against his indebtedness to the bank, he cannot bring suit, after this indebtedness has been paid, without renewing the demand.[1]

A dividend paid to a stockholder, when neither he nor the officers knew the bank was insolvent, cannot be recovered by the assignee. Their mere position as stockholders and officers

[3] Pruyn *v.* Van Allen, 39 Barb. 351.

[1] § 707. Gray *v.* Portland Bank, 3 Mass. 364.

[2] Eidman *v.* Bowman, 58 Ill. 444.

[3] Curry *v.* Scott, 54 Pa. St. 270.

[1] § 708. Hagar *v.* Union Bank, 63 Me. 509.

does not charge them with knowledge, and if the transaction is *bona fide*, it will stand.[2]

§ 709. **Transfer and Certificates.** — Every person who becomes the owner of shares is entitled to demand that the bank shall permit the necessary formalities accompanying and requisite to the completion of a transfer to be performed on its books, and that it shall issue to him a certificate for the shares, such being the ordinary usage of business in this respect.[1] An action will lie for a wrongful refusal to comply with these obligations.[2] Where a by-law declares that shares are transferable by the holder in person or by attorney only on surrender of the certificate, a purchaser of the shares bringing with him the certificate and a proper power of attorney is entitled to have the shares transferred to him. If the bank refuses so to do, the purchaser may have his action for damages for the value of the shares, and this although the bank has improperly transferred the shares to some other claimant.[3] Though if the bank has any lien upon the shares, or if the party himself or the seller of the shares fails to conform to the requisite and reasonable formalities established by the bank in the matter of transfers, the bank will be entitled to refuse to act until the obstacle is removed. Statutory provisions declaring the shares to be transferable at the bank, or that the transfer shall be registered on the books of the bank, are designed for the protection of the bank, and will be so construed as to secure that protection. The transfer will not be considered as having been made "at the bank" simply because the parties have passed and received the certificate within the walls of the banking-house. The act must be so done as "to assume a formal and authentic shape, under the official cognizance of the officers of the institution." The

Right to transfer on the books.

Purchaser may sue bank.

But bank may refuse till formalities are complied with.

[2] McLean *v.* Eastman, 21 Hun, 312.

[1] § 709. Hussey *v.* Manufacturers' Bank, 10 Pick. 415.

[2] Morgan *v.* Bank of North America, 8 Serg. & R. 73.

[3] Bank *v.* Lanier, 11 Wall. 369; and see Bridgeport Bank *v.* New York & New Haven R. R. Co., 30 Conn. 231; Same *v.* Schuyler, 34 N. Y. 30.

regulations of the corporation in the premises, unless unreasonable, must be complied with.[4]

§ 710. **Statutes requiring Transfers to be on the Books.** — Some of the State statutes requiring registry of the transfer of shares follow the exact language of the laws relating to registry of deeds, and declare that no unrecorded title shall be good; or only as against those having actual notice. In California even this sort of law is held not to avail creditors.[1] But in Maine it does,[2] and also in Massachusetts.[3] In another Massachusetts case,[4] where the charter provided that transfers could only be made at the bank and on its books, the court held that an attaching creditor could hold against a previous unrecorded transfer for value, and this was followed in Illinois.[5]

Unrecorded transfer v. attaching creditor.

(*a*) But where there was a by-law providing that a transfer could only be made upon the books of the bank and upon return of the certificate, the transferee was held to have a better right than a subsequently attaching creditor.[6] Neither had effected a legal transfer, and the transferee had the prior equity. Moreover, by-laws are not intended for the benefit of creditors, but for the benefit of the bank and for its internal management.

§ 711. **Transfer only at the Bank and on Surrender of Certificate.** — Where the certificate said "transferable only at the bank, and only on surrender of this certificate," and A. transferred his shares to B., giving him a power of attorney and the certificate, and the bank allowed A. to transfer to C. on the bank books without delivery of the certificate, B. sued the bank and recovered.[1] In another case, where the certificate contained the same statement, A. transferred to

[4] Williams *v.* Mechanics' Bank, 5 Blatchf. C. C. 59.
[1] § 710. Winter *v.* Belmont, 53 Cal. 428.
[2] Skowhegan Bank *v.* Cutler, 49 Me. 315.
[3] Rock *v.* Nichols, 3 Allen, 342.
[4] Fisher *v.* Essex Bank, 5 Gray, 373.
[5] People's Bank *v.* Gridley, 91 Ill. 457.
[6] Dickinson *v.* Central National Bank, 129 Mass. 279.
[1] § 711. Bank *v.* Lanier, 11 Wall. 378 (1870).

C. with power and the certificate. A creditor of A.'s attached the shares in ignorance of the transfer, and C. recovered.[2]

§ 712. **In Connecticut** it is settled, that, where either the charter or by-laws declare that transfers shall be made only on the books, a transfer not so made is not valid for any purpose; the registry is the act that changes title.[1]

§ 713. **The Better Opinion** is, however, that such provisions are only for the benefit of the bank. A purchaser cannot vote or demand dividends, unless he first applies for a transfer in accordance with the charter and by-laws; and beside determining who shall vote and receive dividends, such rules aid the bank in protecting any lien it may have on the stock.

The weight of authority is, that a transfer of a certificate of stock with an irrevocable power of attorney, gives *prima facie* title, and renders the stock transferable by delivery of the certificate. And when any party in whose hands the certificate is found is shown to be a holder for value without notice of intervening equities, his title cannot be impeached, and is not affected by a provision in the charter or by-laws making the stock transferable only on the books of the corporation. Such provision is intended merely for the protection and benefit of the company.[1] The certificate of shares with power of attorney is treated exactly as negotiable paper. In the Mount Holly case, a *bona fide* purchaser from a pledgee without notice of the pledgor's rights held against the assignee of the pledgor, though there was a provision that stock should be transferred only on the books, and this had not

[2] Continental Bank *v.* Eliot Bank, 7 Fed. Rep. 373.

[1] 712. Oxford, &c. *v.* Bunnel, 6 Conn. 552; Marlborough Manuf. Co. *v.* Smith, 5 Conn. 245; 2 Conn. 544; Northrop *v.* Newton, 3 Conn. 544.

[1] § 713. Mount Holly, L. & M. Turnpike Co. *v.* Ferree, 17 N. J. Eq. 118, Rogers *v.* New Jersey Ins. Co., 4 Halst. Ch. 167; Broadway Bank *v.* McElrath, 2 Beas. 26; Fatman *v.* Lobach, 1 Duer, 351; Leavitt *v.* Fisher, 4 Duer, 1; Commercial Bank of Buffalo *v.* Kortright, 22 Wend. 348; Bank of Utica *v.* Smalley, 2 Cowen, 770; Angell and Ames on Corp. §§ 351, 564; Union Bank *v.* Laird, 2 Wheat. 390; Stebbins *v.* Phœnix Fire Ins. Co., 3 Binney, 394; United States *v.* Cutts, 1 Sumner, 133; Grant *v.* Mechanics' Bank, 15 Serg. & R. 143.

been done. In the Rogers case, a purchaser held against a creditor who attached the shares (transferable only on the books) and bought them in at execution sale, having before purchase at the sale notice of the previous unrecorded purchase. The Chancellor held that the equitable title was with the previous purchaser.

In the Broadway Bank case, the act of incorporation said that the stock should be transferable on the books, and that said books should be "evidence of the ownership of said stock in all elections and other matters submitted to the decision of the stockholders of the said company." (The word "only" was not used, which was noticed by the court as distinguishing this case from the Massachusetts cases.) An unrecorded transfer as collateral, or absolutely by delivery of the certificate with an irrevocable power to have the transfer made on the books, carries the equitable title, and the transferee will hold against a creditor of the bailor or transferrer subsequently attaching without notice of the transfer.

In Bullard *v.* Bank[2] a previous unrecorded transfer was sustained against an assignee in bankruptcy. A by-law that purposes to make the stock of a national bank subject to the debts of the holder to the bank is void, and if the bank cannot secure itself by by-law, it certainly cannot secure others. In this case the by-law was that stock should be transferable only on the books of the bank, and "when it is transferred, the certificates thereof shall be returned to the bank and cancelled." So that neither transfer was legally complete, and the equity was with the first.

Again, in the Scott case it was held that an unrecorded transfer of national bank stock takes precedence of a subsequent attachment by a creditor of the assignor, though the creditor has no notice. W., owning shares in a Connecticut national bank, assigned them in New York to D. by delivery of the certificate and a written assignment in blank, with power of attorney in blank to transfer. After the assignment, but before demand upon the bank for transfer, the stock was attached. D. requested the bank to place the stock in

[2] 18 Wall. 589.

his name, but the bank refused, and subsequently the stock was sold on execution to C., whose name was put upon the books. The bank had no by-laws on the subject of transfer. It was held that, in the absence of positive law making transfers without notice to the public fraudulent or void as to creditors without notice, or requiring specific acts in order to a valid transfer, creditors take their debtor's property subject to all *bona fide* liens and equitable transfers, and the bank was liable for refusing.[3] When there is no other equity, priority in time governs.

§ 714. **Refusal of Bank to allow Transfer.** — When a bank improperly refuses to allow a transfer on its books in accordance with a written power, thereby impairing the value of the stock, the action of the bank may be treated as a conversion of the stock, and its value recovered.[1] On failure to transfer stock at the request of a pledgee, a bank is not liable for subsequent depreciation of the stock.[2] This was decided on the form of action. In an equitable action damages as for conversion could not be demanded. B.'s stock in the C. bank was pledged to A. with power to transfer on the books. B. failed, and his assignee notified the bank not to transfer, wherefore it refused A., who brought suit in equity. The decree was that the stock should be sold, the pledgee paid, and if there was any surplus the assignee should have it. A bank having stock standing on its books in the name of a trustee "in trust for" an unmarried female of full age, without power of sale, was held liable to the *cestui* for transferring the stock to a purchaser from the trustee without her consent.[3]

Bank liable for allowing wrongful transfer.

§ 715. **Specific Performance** of contract to sell shares will not be decreed if they are sought in order to control the bank, for that is against public policy.[1]

[3] Scott *v.* Pequonnock National Bank of Bridgeport, 21 Blatchf. 203. See Johnson *v.* Laflin, 103 U. S. 800.

[1] § 714. Bank of America *v.* McNeil, 10 Bush, 54 (Ky., 1873).

[2] Dayton National Bank *v.* Merchants' National Bank, 37 Ohio St. 208 (1881).

[3] Magwood *v.* Southwestern R. R Bank, 5 Rich. L. 379 (S. C., 1874).

[1] § 715. Toll's Appeal, 91 Pa. St. 434 (1879).

§ 716. **The Bank as a Shareholder in its own Capital Stock.** — Shares in the capital stock of the bank may at any time be transferred to it by the holder, for the purpose of securing or discharging his indebtedness to the bank. The bank may then properly hold and own these shares precisely as if it were an outside party. It was said, in the case cited below from 10 Ohio Reports, that it was only for this purpose of securing a debt that a bank could legally become interested in its own stock, and that the propriety of removing the restriction even in cases of this nature was not wholly free from question.[1] But in Vermont banks have a general right to purchase shares in their own stock.[2] If the shares are transferred to the president, or other proper officer, in trust to be held as security for the debt, and to be sold if the debt should not be paid, and any surplus proceeds of the sale after discharging the debt and expenses to be held for the benefit of the debtor, the debtor will be regarded as a shareholder in the corporation so long as the shares remain unsold. The arrangement will not be deemed absolutely to divest him of all title to and interest in his property until the trustee has actually parted with it under the power.[3] But if, while the shares are still in the hands of the trustee, an instalment is demanded which the transferrer neglects to pay, and dividends are declared, which however are only payable to shareholders who have duly paid their instalments, he will not be allowed afterward, upon paying the debt and obtaining a retransfer of the shares, to recover the dividends from the company. The bank is under no obligation, from the nature of the trust, to advance money to pay the instalments on behalf of the debtor. On the contrary, unless it felt bound to do so, for the purpose of ultimately saving itself from loss by preventing the security from deteriorating

Transfer as security. Dividends.

[1] § 716. State of Ohio *v.* Franklin Bank of Columbus, 10 Ohio, 91; Taylor *v.* Miami Exporting Co., 6 Hamm. 176; also, by implication, the two cases cited next below.

[2] Farmers & Mechanics' Bank *v.* Champlain Transportation Co., 18 Vt. 131; 23 id. 180.

[3] Merchants' Bank *v.* Cook, 4 Pick. 405.

in value, it would, strictly speaking, have no right to use the funds of the bank in this manner. It would be a misappropriation of them.[4]

§ 717. **Shareholders' Right of Action against Directors.** — The right to sue directors for malfeasance in office, whereby loss accrues to the shareholders, is often expressly given to the shareholders by statutory enactment; though, without doubt, *it exists at common law* in the absence of any legislative intervention. Errors of judgment, unless so gross as to resemble fraud, or to render the acceptance of office practically a fraud by reason of entire incapacity and unfitness for it, give no right of action. But any fraudulent act, or any breach or neglect of statutory or charter provisions, whereby loss is entailed upon the corporation, and the value of the shareholders' property is as a necessary consequence depreciated, gives a right of action at law to each one of them to recover the damage or loss which he individually has sustained. The suit need not join all the directors, nor even all who participated in the wrongful act, as defendants; but any one of them may be sued singly.[1] In this case, however, the declaration is insufficient if it alleges simply that this sole defendant did an act which could in fact be done only by several directors. The allegation must be that he, together with others, did the act. Neither is it sufficient simply to allege that he has done wrongful acts; the nature of the acts should be set forth in general terms, though an accurate description of each part or element going to make up the entire act complained of must often be impossible, and may be dispensed with. Thus if the fault lay in discounting a number of notes in excess of the amount allowed by law, it is sufficient to declare generally that such excessive discounting has been performed, without describing the precise notes and loans

Ordinary error of judgment no liability; but fraud, or breach of organic law, or gross neglect, creates a liability.

[4] Marine Bank *v.* Biays, 4 Har. & J. 338.

[1] § 717. Conant *v.* Seneca County Bank, 1 Ohio St. 298; Buell *v.* Warner, 33 Vt. 570; also in Foster *v.* Essex Bank, 17 Mass. 479, per Pickering and Webster *arguendo*, and by implication in the judgment of the court.

through which it was done. An allegation that by reason of the act the plaintiff's shares depreciated in value, is a sufficient allegation of loss. That the directors declared a dividend out of the capital stock of the bank, instead of out of earnings, is a good cause of action. Nor is it a defence that the shareholder who brings the suit has himself received the dividend upon his own shares, provided that he did not know at that time the improper basis upon which it had been declared.[2] It has been held in Massachusetts that the suit must be brought in contract, and that an action sounding in tort will not lie. The portion of the opinion which lays down this rule is clear and conclusive, though it was gratuitously advanced by the court, the point not being strictly necessary to the decision of the cause.[3]

Dividends.

Form of action.

(*a*) But the right of action of the shareholder, and the claim on which it is founded, though good as against every member composing the board of directors, yet runs against them as individuals, and not in their official capacity. It constitutes their private indebtedness, to be discharged by them from their private property. The corporation is in no sense liable for it, though the act out of which it arose was that of the corporate government acting officially. The suit could not be brought against the corporation, and corporate funds could not be used to compound or discharge it. Hence it follows that a shareholder cannot avail himself of a claim of this nature by way of set-off against a debt due from himself to the bank.[4]

(*b*) If by gross neglect or inattention to duty directors suffer the corporate funds to be lost or wasted, they are liable, and the receiver of a national bank can bring suit, at least when there is no proceeding pending for forfeiture; but if the receiver is one of the faulty directors, the action may be by the stockholders, and, if numerous, by one or more in behalf of all.[5]

Suit by receiver, or if he is in fault, by the stockholders.

[2] Ibid.; Gaffney *v.* Colvill, 6 Hill, 567.

[3] Vose *v.* Grant, 15 Mass. 505.

[4] Whittington *v.* Farmers' Bank, 5 Har. & J. 489.

[5] Brinkerhoff *v.* Bostwick, 88 N. Y. 52.

(*e*) But in New Jersey it has been held that a stockholder in a national bank cannot maintain an action against the president and directors for their neglect and mismanagement, whereby the bank became insolvent and the stock worthless. There is no legal privity between the stockholders and the officers; the latter are agents of the corporation, not of the individual shareholders. Any money recoverable from the officers would be assets of the bank, and should go to pay its debts, only the surplus being subject to any right in the shareholders.[6]

§ 718. **Sovereign States as Shareholders.** — It has been already observed that the "State banks" which have at various times been established by divers of the States, though differing from each other in sundry less important particulars, have resembled each other in their main characteristics. The State is a shareholder, sometimes jointly with others, sometimes as sole shareholder. Sometimes it is one of the corporators, sometimes it is not. It usually contributes to the capital from the public funds, and sometimes contributes the whole capital. It shares in the profits, or takes all the profits, as the case may be. But under all the various schemes which have been devised, the State, as a political entity, remains distinct from the bank as a corporate entity. Hence it follows, and has been uniformly held, that the creditors of the bank have precisely the same rights to enforce their claims against the corporation, and to subject its assets to the payment of their demands, as if there were no manner of connection or relationship between the bank and the State. Laws which seek to provide means of winding up the corporation upon any plan which would prefer the State to private creditors, or return to the State its investment to the damage and loss of the private creditors, are contrary to the Constitution of the United States, as impairing the obligation of contracts. The State, having gone into a business enterprise, cannot exercise its sovereign powers in such a manner as to gain for itself any peculiar privilege or advantage at the

State and bank are distinct corporations.

State not preferred to private creditors in such cases.

[6] Conway *v.* Halsey, 44 N. J. Law, 462 (1882).

cost of others who have gone into the same enterprise, or who have dealt with the corporation in the due and ordinary course of its business as a bank.[1]

Bank of U. S. v. Planters' Bank of Georgia.

In the case of the Bank of the United States *v.* Planters' Bank of Georgia,[2] the decision was, substantially, that the fact of the State of Georgia being a shareholder in the defendant corporation did not prevent the corporation from being sued in the courts of the United States. Had the State itself been the defendant, the Constitution would have denied jurisdiction to these courts; but it was said in the opinion, that a suit against the bank was "no more a suit against the State of Georgia than against any other individual corporator. . . . The State does not, by becoming a corporator, identify itself with the corporation. . . . It is, we think, a sound principle, that when a government becomes a partner in any trading company it divests itself, so far as concerns the transactions of that company, of its sovereign character, and takes that of a private citizen. Instead of communicating to the company its privileges and its prerogatives, it descends to a level with those with whom it associates itself, and takes the character which belongs to its associates and to the business which is to be transacted. . . . The government of the Union held shares in the old Bank of the United States; but the privileges of the government were not imparted by that circumstance to the bank. . . . *The government by becoming a corporator lays down its sovereignty*, so far as respects the transactions of the corporation, and exercises no power or privilege which is not derived from the charter." This ruling was afterward affirmed in a case where the State was the sole proprietor, but not, as in the earlier case, a corporator.[3] Curran *v.* State of Arkansas,[4] fol-

The State legislature cannot appropriate the assets.

[1] § 718. Bank of the United States *v.* Planters' Bank of Georgia, 9 Wheat. 907; Bank of the Commonwealth of Kentucky *v.* Wister, 2 Pet. 318; Curran *v.* State of Arkansas, 15 How 304; State *v.* Bank of the State of South Carolina, 1 Rich. S. C. N. S. 63.

[2] 9 Wheat. 904.

[3] Bank of the Commonwealth of Kentucky *v.* Wister, 2 Pet. 318.

[4] 15 How. 304.

lowing in the same logical sequence, holds that the creditor of a State bank, wherein the State is sole proprietor and original furnisher of all the capital stock, may follow the assets and capital of the bank, in equity, for the satisfaction of his claims, in spite of State legislation whereby the legislature has attempted to appropriate to the State (in reimbursement of its original contribution) all the assets of the corporation. In the South Carolina case cited,[5] the State had pledged its faith for the support of the credit of the bank, and when the institution found itself in financial difficulties, the State then sought to take the corporate assets, on the ground that it was a surety for the indebtedness of the bank, was directly liable to the creditors of the bank, and was therefore entitled to appropriate the assets of the institution whose debts it must pay. But, upon the strength of the principles laid down by the Supreme Court of the United States in the foregoing cases, the State court very properly overruled these positions.

Such legislation would impair the obligation of contracts.

(*a*) In Tennessee the same principle was applied. The legislature enacted that directors be appointed to put the Bank of Tennessee in liquidation, and that they should collect all debts, and cause an assignment of all the bank's property to be made in trust, *first*, to secure the amount of the common school fund deposited in the bank by acts of the legislature; *second*, to secure all just creditors. This was held unconstitutional. The common school fund when deposited became a part of the assets of the bank, to which all creditors had a right to look.[6]

State as a depositor.

§ 719. **A Case in Tennessee** is a fine illustration of the grouping of legal principles, liability of stockholders, directors, Statute of Limitations, &c., and we give the points together, instead of analyzing the case. M., B., and B.'s two brothers, W. and J., bought all the stock of a bank, to the amount of $110,000, the charter whereof required the stock to be

Moses *v.* Ocoll Bank. Irregular payment of stock in notes of the directors, &c. § 659.

[5] State *v.* Bank of the State of South Carolina, 1 Rich. S. C. N. S. 63.

[6] State *v.* Bank of Tennessee, 5 Baxter, 1 (1875).

paid in gold or silver, or in notes which the directors might deem equivalent thereto. They elected themselves directors, and B. president. They then deposited their own notes, indorsed by each other, to the amount of $50,000; and this, with $40,000 in notes of a railroad company, $8,800 in a draft on another bank, and $1,200 in coin, they treated as one half of the whole stock, which was to be $200,000. After nearly two years' banking operations, including issuance of a large lot of bank notes, J. gave the bank his note, for himself and the other stockholders, for $50,000, treating it as so much increase of the capital stock. Five years afterwards this note was cancelled without being paid. Inspection of the books was refused, and the names of the indorsers of the stock notes were concealed from holders of the bank notes and from other creditors of the bank, seeking relief in equity. A bill therefor was brought before the Statute of Limitations had intervened against the makers of the stock notes, but after it had intervened in favor of W.'s personal representatives, W. and J. having died; and the complainants were allowed to resort to W.'s original liability. *Held*, —

1. That such payment of stock in mutually indorsed notes of the directors was not authorized by the charter.

2. That these notes must be regarded as valid obligations for the protection of the issues of the bank and its general creditors, would bear interest, and be subject to the Statute of Limitations, and, when paid or collected, would be credited as payments *pro tanto* on the unsatisfied stock.

Notes valid as a protection of creditors.

3. That until the stock subscribed was actually paid up, it must be considered as a debt subsisting independently of the notes executed in payment thereof, as to which the Statute of Limitations would begin to run from the time a call was made for a payment of the stock.

Stock subscription was a debt independent of the notes.

4. That in adjusting the liabilities of subscribers, actual payments on stock would bear interest from the date at which they were made.

Interest on actual payments.

5. That those stockholders who paid their stock in notes of the bank should be allowed only what they paid for the notes. Payments valued at actual cost to payor.

6. That for the period of concealment of the names from the creditors seeking their remedy, the indorsers could not avail themselves of the defence of the Statute of Limitations. Statute of Limitations did not run during concealment.

7. That the creditors of the bank were entitled to have the subscribed $50,000 for which J. gave his note paid up by the stockholders, and the proceeds should be applied to the satisfaction of their claims. The stock purporting to be subscribed could not be declared to be a mere call on the old unpaid stock; nor could the cashier comply with an instruction from J., upon executing his note, to reduce the stock by the amount so subscribed. Ostensible increase of stock must be made actual for benefit of creditors.

8. That the directors were personally liable for the whole amount of securities accepted for stock in breach of their trust. Directors liable personally.

9. That the holders of the circulating notes were entitled to priority of payment over the other creditors.[1] Note-holders entitled to preference.

§ 720. **Mandamus to compel Transfer.** — A sheriff has a right to access to the books of a corporation to levy on the stock, and the officers of a national bank may be compelled by mandamus to allow the sheriff access to transfer stock to an execution vendee. The right is enforced by statute in Indiana.[1] Except as to transfers under a judicial sale, (in which case the bank officer becomes a public official *pro hac vice*,) mandamus will not lie to compel a bank officer to make a transfer.[2]

§ 721. **Injunction against Alienation.** — How far, under what circumstances, and upon what application, a court of equity would restrain a corporation from an improper alienation

[1] § 719. Moses *v.* Ocoll Bank, 1 Lea, 398 (Tenn., 1878).

[1] § 720. State *v.* First National Bank of Jeffersonville, 89 Ind. 302 (1883).

[2] Bank of Georgia *v.* Harrison, 66 Ga. 696 (1881).

of its property, must depend upon these general principles, which guide it in the exercise of its powers; but there is little doubt that, in a proper case made, it would interfere to prevent a disposition of its property for other than corporate purposes.[1]

[1] § 721. Binney's Case, 2 Bland Ch. 142; Kean *v.* Johnson, 1 Stockt. 401.

CHAPTER XLII.

INFORMALITY, ULTRA VIRES, AND FORFEITURE.

§ 722. Analysis.

I. Formality.

(1) Directory, when the intent of the legislature was merely to prescribe a form that should be sufficient beyond cavil, but not exclusive of other forms. § 743.

(2) Imperative, when the intent was to exclude other forms. No action can be had on a contract not conforming to an imperative provision, but suit may be brought upon any contract implied in the facts. § 729.

But imperative formalities will be reasonably construed, and a requirement that corporation contracts shall be signed by directors, &c. will not apply to contracts in the ordinary routine of business, so as to prevent the cashier from drawing, signing, and indorsing checks, bills, &c. § 744.

(3) Distinction between informality and *ultra vires*. § 729.

II. Ultra Vires and Forfeiture.

Principles underlying the legal treatment of these subjects. § 723.

Strict consistency would require that, when any act is done against legal right, the act should be recognized only to punish, and never as a valid, enforceable transaction. § 742. § 756. § 747.

The law should not even seem to sustain its own violation. But in many cases, if the law of *ultra vires* were allowed to defeat the suit brought directly upon the contract, there would be good foundation for a second suit, which would bring about substantially the same result as if the court refused to allow the plea on the direct suit. This course is therefore taken in such cases to secure substantial practical justice in the most convenient and least costly way.

Some cases, however, refuse to recognize an *ultra vires* contract as a contract, but will do justice on the facts. §§ 756, 757.

Condensed statement of the law of *ultra vires*. §§ 724–742.

(*a*) Is the act in question in any particular case an act of the bank. § 724.

(*b*) Is the act *intra vires* or *ultra vires*.

(*c*) Effect of improper or illegal conduct aside from the transaction in suit, or of irregularity in organization of the bank. Cases, § 758. § 726.

(*d*) *De facto* existence sufficient for ordinary business.

(*e*) *De jure* existence necessary to the valid exercise of privilege.

§ 727. (*f*) Tort creates a liability that no plea of *ultra vires* can ward off.

§ 728. (*g*) Some acts are *ultra vires* only for lack of consent of the persons for whose benefit the violated provision of law exists; these can be ratified, and only the said persons can object to them. § 750 *a*.

§ 729. (*h*) Distinction between *ultra vires* and informality.

§ 730. (*i*) An executory *ultra vires* contract cannot be enforced.

§ 731. Executed contracts.

§ 732. (*j*) No action on contract *malum in se*, or void by statute. Cases, § 746

§ 733. (*k*) But if the legislative intent is, that the prohibited contract shall be good between private parties, the plea will not be heard. Cases, §§ 750–755.

§ 734. (*l*) Nor, subject to (*j*), can one who has received and retained a benefit from the transaction set up the plea *for his own sake*. Cases, §§ 749–755.

§ 735. (*m*) Nor can it be set up against one who has acquired rights that would be good except for a matter of fact, of which he has no reasonable notice, which consideration divides

§ 736. our subject into *ultra vires* absolute and *ultra vires* by circumstances, the latter being known or unknown. See cases, § 745.

In other cases, no action can be brought directly on an *ultra vires* contract. § 736.

§§ 738, 739. When a bank is not liable on an *ultra vires* transaction.

§ 740. When a bank is liable on an *ultra vires* transaction.

§ 741. When the bank can enforce an *ultra vires* transaction.

§ 742. Discussion of the law of this topic.

CASES.

§§ 746–750. Where the plea is sustained under *j*, or because neither *k*, *l*, nor *m* apply.

Plea not sustained,

§ 745. Under *m*.

§§ 750–755. Under *k* or *l*. See Union National Bank *v.* Mathews, §§ 753, 754.

§§ 756, 757. Cases recognizing the true rule in *ultra vires*.

§ 758. *Ultra vires* aside from the transaction.

FORFEITURE.

§§ 760, 761. What constitutes a cause of forfeiture.

(1) Nature of acts which are causes of forfeiture.

(2) The line between individual action (or such as is attributable only to the officer) and corporate action (or such as, though

§ 762. done by an individual officer or agent, is yet imputable to the bank as a cause of forfeiture).

§ 763. Effect of the occurrence of a cause of forfeiture.

Business may be done till a forfeiture is judicially declared.

§ 764. Waiver of a cause of forfeiture by the legislature.

§ 723. **The Thoughts underlying this Chapter are these:** —

(1) When there is a statutory provision bearing upon the matter, the legislative intent governs. And this intent is to be judged of on the principle that the legislators are not to be presumed to have intended any unjust, unreasonable, or absurd consequence, and statutes will not be administered to produce such result unless their language is incapable of a better construction.

(2) No contract *malum in se* will found an action at law. The maxims, *In pari delicto*, and *Ex turpi causa*, govern, —

(3) Subject to (1), any *bona fide* acquirer of rights for value, which would be good except for *ultra vires* of which he has no actual or constructive notice, will be protected.

(4) Subject to (1) and (2), any benefit received under an *ultra vires* transaction must be accounted for, and no liability for tort, or on contract implied by the facts, can be avoided on the plea of *ultra vires*.

(5) In applying (3) and (4) the result of allowing the plea of *ultra vires* and then holding the parties to do justice on the facts is usually practically identical with refusing to allow the plea, and holding the transaction good as between the parties.

(6) The immediate parties to the transaction can in other cases plead *ultra vires*, e. g. in case of executory *ultra vires* contracts, or where one party has received no benefit and the other has notice.

(7) The party injured by the violation of law is the only one who can raise the objection. This is the general rule, but the law will not aid a plaintiff who had notice of the *ultra vires* character of the transaction on which his claim is based, as against one who is not a party to the transaction, and has received no benefit from it. § 748.

(*a*) In case the *ultra vires* is not in the nature of the immediate transaction, but in some matter on which it rests, if the just rights of the party are affected by the *ultra vires* he may object, (a purchaser of stock may deny the validity of a by-law creating a lien on the stock, on the basis of which the bank has refused to transfer the stock to him.)

(*b*) If the *ultra vires* has no real bearing on the rights of

a party, D., he cannot object. Irregularity in the organization of the bank, or election of officers, or a distinct *ultra vires* transaction with some other person, is no just excuse to relieve D. from liabilities arising from his own transactions with the bank; and so, if D. makes a contract with reference and in subjection to another contract, even though the latter be *ultra vires*, D. cannot enlarge his rights by raising the objection; his rights are not affected by it, he contracted in reference to it.

To do ordinary business, such as an individual might, it is enough to be a *de facto* corporation.

(*c*) If a limitation is only for the benefit of stockholders, they alone as a rule can make objection, though of course the immediate parties to the contract can sometimes object under (1) and (6). Forfeiture will not be enforced, but the courts will correct the wrong rather than still further punish those for whose protection the law was made.

(*d*) If a limitation is only for the public welfare and safety, the state is the only party to object by suing for the penalty of forfeiture.

(*e*) If a limitation has the benefit of more than one party in view, each may object.

(*f*) If, instead of limiting the powers of a corporation making them less than those of a private individual, a provision of law gives it a privilege, or power to do what in a private individual would be an infringement on the rights of others, as to interfere with the transfer of property, to declare shares forfeit for nonpayment of calls, or exercise eminent domain, any one encroached upon by the unauthorized exercise of such a power can object. No one can be deprived of his legal rights but by his own consent or due authority of law.

To exercise privilege, the bank must be a *de jure* corporation.

In short, the substance of the matter is this.

Subject to (1), the courts will do substantial practical justice on the facts of each case; in general, they will not recognize a violation of law except to punish; but where justice requires refusal to allow the plea of *ultra vires*, or where justice can be conveniently done in that way, that course will be taken, though it might be more consistent to refuse to recognize any *ultra vires* transaction, to allow the plea in all cases,

and make the case stand expressly, as well as actually, simply on the obligations growing out of facts.

A tolerably sure prevision of the substance of the judgment of law in any *ultra vires* or forfeiture case can be arrived at by applying (1) and (2), and keeping in mind these fundamental principles: that only the person for whose benefit a provision of law was made, and whose rights are infringed by its violation, can sue for redress or penalty, or take *advantage* of it; that the law will not enforce its own violation, nor recognize it except to punish; that ignorance of fact is a good excuse, and one innocent of breaking the law will be protected from loss by a breach committed by another; that an equivalent must be rendered for benefit received, unless it is given to or forced upon the recipient, or unless the parties have put themselves beyond the aid and sympathy of the law, as under (1) and (2), and that one, X., who by his conduct intentionally causes or permits another, Y., to believe a matter of fact, and act by reason of that belief to his disadvantage, is estopped in any suit with Y. to deny the truth of the supposed fact, and the same rule holds between the representatives in interest of X. and Y.

§ 724. **Ultra Vires and Informality.** — The first question in regard to any act is whether the bank is involved at all. Is it the act of the bank, or the individual act or omission of its agents? For the principle governing this matter in relation to third parties, see § 79 *et seq.*, and in relation to forfeiture, see §§ 760, 762.

Is the act that of the bank?

§ 725. If the bank is involved, the next inquiry is whether the transaction is *intra vires* or *ultra vires*. What the bank may do, we have considered in § 47 *et seq.*, and will here only remind the reader that the *presumption* is that the bank has not exceeded its powers,[1] and that *substantial* performance of the provisions and conditions of its existence is all that is required. (See Forfeiture, A.)

Is the act *ultra vires?*

If it is the act of the bank, and is shown to be *ultra vires*, then we have to ask *the effect* of this fact. The result as between the bank and the sovereign we shall consider under the

[1] §§ 725. See § 56. Contracts.

head of Forfeiture. As between the bank and its officers, or officers and third persons, see § 79 *et seq.* The effect of conduct of a bank in excess of its powers, or non-compliance with any provision of law, as between the bank and third parties is our subject in this chapter. The question whether the plea of *ultra vires* will be allowed in any suit between the bank and third persons, in order to deny the validity of the transaction on which the suit is based, or of any other transaction relevant to the case, is determined by the following principles.

Effect of the bank's *ultra vires* action as to third parties is our subject.

§ 726. *In general*, neither the bank nor any private party in litigation with it can escape liability on the ground of any improper or illegal conduct of the bank in other distinct transactions from the one in dispute, nor any original informality or irregularity in the formation of the company;[1] as wrongful loans to other persons, or failure to pay in the capital as required by law. (See § 758 for cases.)

In the absence of statutory provision to the contrary, it makes no difference in a private suit between the bank and third persons upon transactions not involving *privilege*, whether the bank or its officers are legally such, or have only a *de facto* existence. (See §§ 45, 79 *et seq.*) Nor does the occurrence of a cause of forfeiture affect subsequent transactions between the bank and third parties. (See Forfeiture, C.) Justice between the litigants does not depend on these considerations.

De facto existence sufficient.

But the case is altered if the controversy involves a *privilege* of the corporation, i. e. a power to do acts in contravention of common right, a portion of the sovereignty; as, for example, the power of eminent domain given to corporations in some cases. To sustain such transactions, it is always necessary that the corporation should be a corporation *de jure*, and not simply a corporation *de facto*.[2] No one can be deprived of his common rights or property but by one actually and fully authorized by the sovereign. (See § 758.)

[1] § 726. Alinson *v.* Hubbell, 17 Ind. 559; Southern Bank *v.* Williams, 25 Ga. 534.

[2] New York Cable Co. *v.* Mayor, &c. of New York, 104 N. Y. 43.

§ 727. **Tort.** — A distinction must be made at the outset between *ultra vires* transactions which constitute a tort, and those involving only matters of contract. No plea of *ultra vires* can ever avail to ward off liability for a tort.[1] A tort is always *ultra vires*. It would be a lamentable state of law in which a court would allow a defendant to say, "I exceeded my power, and, as the law will not recognize any transaction that involves its own violation, you cannot recover." The law will recognize its own violation to punish it, and compel justice, and prevent a wrongdoer from taking advantage of his own wrong; and to escape, the defendant must show that the plaintiff has violated the law in an equal degree, and so is unworthy to ask its aid, for the State cannot be at the expense of sustaining courts to settle the disputes of rascals, and see that neither gets the best of the other. Tort v. contract.

§ 728. We may here consider acts which, though *ultra vires*, are so only because they lack the consent of private persons, and are therefore subject to ratification. When an act is only internally *ultra vires*, that is, it is wrongful only by reason of infringing on waivable rights of stockholders, as in the case of a by-law imposing unauthorized liability on them, or any action of the bank giving away its property, or perhaps going security on accommodation paper, its wrongfulness will cease by the express assent or long continued acquiescence of stockholders. And in general it may be said, that, whenever a transaction is *ultra vires* only because of the lack of consent of certain persons, it may be cured by the ratification of those persons, express, or implied by their acquiescence, with knowledge of the facts. Cure of acts *ultra vires* with reference to rights of particular persons. Ratification.

[1] § 727. *Ultra vires* is no excuse for a tort committed by a corporation. National Bank *v.* Graham, 100 U. S. 699. A national bank, having come into possession of a warehouse, refused to deliver the grain therein stored to the holder of the grain receipts. The conversion of the grain to its own use was a tort, and it does not matter whether the wrong was done while the bank was in the pursuit of its legitimate business, or was violating its organic law. It cannot be heard to say that its acts as a warehouseman were *ultra vires*, to shield itself from the consequences of another wrongful act. German National Bank *v.* Meadowcroft, 1 N. W. Rep. 759 (Ill.).

When a corporation makes a contract not in violation of public law or public policy, but only a breach of trust as to the stockholders, no one but the State or the stockholders, or the corporation in behalf of the stockholders, can object to its validity. For example, where two corporations made such a contract, and a mortgage was given in express recognition of the contract, a bondholder under this mortgage could not set up the incapacity of the corporations to make the contract. Only the corporations themselves, the immediate parties to the agreement, or the stockholders, parties by representation, held such a legal position in relation to the contract as to enable them to deny the power of the parties.[1] See § 750 *a*.

To internal *ultra vires* outside parties cannot object.

§ 729. **Informality.** — A second distinction is to be taken between the mere informality of a contract and *ultra vires* in its substance. Formalities are directory, or imperative; the former merely prescribe a method, which, if followed, will make the contract valid beyond cavil, but do not exclude other methods; when the provision of law in regard to form is of this class, and a contract is made in any form valid at common law, though not in conformity with such provision, recovery may be had, nevertheless, in a suit on the contract. When the provision is imperative, (which is to be decided by the court on construction of the statute,) neglect of it will prevent any direct action upon the contract, but will never affect recovery upon the contract obligations implied by law on the facts, as to pay money had and received. See cases, § 743.

Distinction between informality directory and imperative, and *ultra vires* in substance.

§ 730. **Executory Contract.** — A distinction lies between an executory contract and one executed in whole or part in regard to the effect of *ultra vires* in the substance of the agreement. An executory contract neither party can enforce.[1] Though there may be liability attaching to officers or bank for tort in connection with the transaction, as in case of misrepresentation, no corporation can claim the aid of the

[1] § 728. Vermont & Canada R. Co. *v.* Vermont Central R. Co., 34 Vt. 2.

[1] § 730. Nassau Bank *v.* Jones, 95 N. Y. 115. See Woodruff *v.* Erie Railroad Co., 93 N. Y. 618, and cases cited.

law to compel A. to do what it had no lawful right to receive A.'s agreement to do; that would indeed be asking the law to enforce its own violation; nor can A. claim the aid of law to compel a bank to do what the law says it shall not do. These are clear reasons, and so long as the contract is executory there is no counter reason to overcome their force.

§ 731. **Executed Contracts.** — We come now to consider the effect of *ultra vires* between the parties to a private suit, in case the tainted contract is executed in whole or part. The judges are not in harmony. They differ as to the interpretation to be put on the meaning of legislatures, and the proper method of doing justice in *ultra vires* cases. To prevent circuity of action, and do substantial justice in the briefest, least complicated way, the court will often sustain a direct action on an executed *ultra vires* contract.

The following principles have been arrived at upon a wide survey of cases, not only in relation to banks, but throughout the field of corporation law, and are fully verified and illustrated by the banking cases in the succeeding sections.

§ 732. No action can be brought on a contract which is *malum in se*, or expressly declared void by statute, or in regard to which it is the opinion of the court that the legislative intent was to render it void. See §§ 746, 747.

§ 733. An action on an *ultra vires* contract will be sustained, if the legislature has declared that the transaction, though *ultra vires*, shall not be void, but only voidable by the action of the State; or shall have no other effect than to subject the bank to a penalty or forfeiture; or if it is the opinion of the court that such was the intent of the legislature as indicated by the attachment, expressly, of a penalty, or declaring that the transaction should constitute a cause of forfeiture, thereby excluding other consequences (*expressum facit cessare tacitum*); or as indicated by the unreasonable results of the opposite construction; for example, when to hold the *ultra vires* transaction void would punish the very persons whom the legislature plainly meant to protect, or would be followed by other manifest injustice. See §§ 750, 753.

§ 734. (*a*) Subject to § 732, the plea of *ultra vires* can never be set up for his own sake *by* a party who has received benefit under the transaction, which he cannot or does not give up; for example, that the bank makes a loan to B. beyond the legal limit, does not enable the borrower to avoid payment of the money he received.[1] See § 750.

(*b*) But the fact of benefit will not prevent a party setting up the plea when it is not really for his own sake he pleads, but on behalf of innocent parties who have a superior equity to the party against whom the plea is made; as if it is in favor of *intra vires* creditors of an insolvent bank, and against *ultra vires* creditors with notice. See § 746.

§ 735. The plea of *ultra vires* can never be set up *against* one who has acquired rights under the transaction which would be valid in law but for a *matter of fact* of which he had no reasonable notice. Two facts must coexist in reference to the person against whom the plea is urged, to bring the case within this section; first, he must be in the position of a *bona fide* holder for value, he must have parted with some property or right, or suffered some loss pecuniary, or in some way altered his position (to his disadvantage if the contract is null) in consequence of the transaction; and second, the fact by reason of which the transaction is *ultra vires* must be one which he did not know of, and could not by reasonable diligence have known, i. e. one of which he had at the time of the transaction no notice actual or constructive. See § 750.

Ultra vires absolute, or by circumstance.

Under this head we must distinguish between acts that are *ultra vires* absolute, or such as are beyond the powers of the bank for any purpose and under all circumstances, (as alienating or mortgaging its franchises,) and acts that are *ultra vires* by circumstance, or such as are beyond its authority for some purposes or under some circumstances, but are within its power under other circumstances or for other purposes. For instance, a bank may borrow for legitimate banking purposes, but not for the pur-

[1] § 734. O'Hare *v.* Second National Bank of Titusville, 77 Pa. St. 96; Pangborn *v.* Westlake, 36 Iowa, 546; Vining *v.* Bricker, 14 Ohio St. 331.

pose of speculation; again, it may loan money to a director, but not beyond a certain limit; it may loan to the public, but only to a certain amount; it may indorse negotiable paper, but not for accommodation; for other things it may and may not do, see § 47 *et seq.* Now, it is obvious that where the lack of power is purely a matter of law, as in *ultra vires* absolute, no one can plead ignorance; but when some matter of fact may obscure the *ultra vires* character of the contract, the party may or may not have had notice of such fact; and we have two classes: *ultra vires* by circumstance known, and *ultra vires* by circumstance unknown, according as the person in controversy with the bank had or had not actual or constructive notice. This distinction is of great import, for the ignorance of law is no excuse for breaking it; but innocent ignorance of fact is an excuse; and if a person has in fact done nothing unlawful, if he has used due diligence to ascertain the facts, and on the circumstances within his reach his conduct is legal, such a person the law will hold harmless.

§ 736. In other cases the plea will be allowed; for, in the absence of strong reasons to the contrary, the law will not sustain an action based on a transaction it forbids. For example, where the party setting up the plea has received no benefit, and the other party either has not parted with value, or had notice. See § 746.

§ 737. **Statement from another Point of View.** — It may be of use to restate the chief points of the law above laid down, in terms of the bank's liability and power to enforce.

§ 738. **A bank is not liable,** i. e. it may set up the plea of *ultra vires*, —

(1) In any case in which the contract on which the suit is based is *malum in se*, or expressly declared void by the legislature, or the court is of opinion that such was the legislative intent.

§ 739. (2) Also in any case, [unless it should fall under (3),] where it has received no benefit, (or, it seems, if it can and does return the benefit received,) and at the same time one of two things is true of the opposite party; first, that he had reasonable notice of the unlawfulness of the transaction

(that its *ultra vires* character did not depend on a matter of *fact* which he did not and could not with reasonable diligence know); or, second, that although without notice he is also without damage by the transaction, having parted with nothing of value.

§ 740. **The Bank is liable,** — (3) In any case where the unlawfulness of the transaction depends on statutory provision which expressly declares that the contract is not to be invalid, or when such is in the opinion of the court the legislative intent, considering the context and the consequences of an opposite construction. And that such construction would punish the very parties whom the legislature has manifested a wish to protect, or would allow the bank to take advantage of its own wrong, or would in any way work manifest injustice, or that the legislature has expressed what shall be the consequence of violation of the law by attaching a penalty or forfeiture to it, thus by implication excluding other consequences, are reasons often weighty against considering a transaction void, and allowing the plea of *ultra vires*.

(4) In other cases not falling under (1) or (3), as where the excess of power is not a violation of statute, but of common law, or if a breach of statute there is nothing in the law to show whether the legislature intended the transaction to be void or not, then the bank will be liable on its *ultra vires* contract, *provided* that either of the following combinations of fact exist: *first*, that the bank has received benefit from the transaction which it cannot or does not restore, (and giving up the benefit would in many cases be about the same as paying the amount sued for); or *second*, that the opposing party against whom the plea of *ultra vires* is hurled can show *both* that he had no notice actual or constructive that the contract was *ultra vires* (its character as such depending on the presence or absence of some matter of fact, which said party did not and could not with reasonable diligence know), *and* that he is a holder for value, or has parted with value or changed his condition disadvantageously by reason of the transaction. If either of these points fails, the second proviso does not avail to stay the plea of *ultra vires*. If *neither proviso*

is sustained by the facts, then contracts within the description in the beginning of (4) come under the ban of (2), and are void; for, in the absence of strong reasons to the contrary, no act in violation of law can be held to be a valid act.

(*a*) The burden of proof in any case is first to show that the act is *ultra vires*, and if this is shown the burden is on him who objects to the plea of *ultra vires* and wishes the court to hold that the contract is not void. Burden of proof.

§ 741. **The Bank cannot enforce an Ultra Vires Contract** in cases falling under (1). In cases coming under (2), i. e. where the other party to the suit has received no benefit which he retains, the bank can never enforce; [(2) does not include cases falling under (3);] for the other element in the combination is always present when the bank is plaintiff, since it can never claim ignorance of its own powers, or the facts that make the transaction wrong (at least if cases can occur in which ignorance of such fact could innocently exist on the part of the bank, they must be rare.) So in (4) the second proviso has no application when the bank is plaintiff, but it can enforce contracts within the first proviso, or coming under (3).

§ 742. **Discussion of above Rules. Change Suggestion.** — This statement of the law derived from the cases satisfies the sense of justice except in respect to cases falling under the provisos of (4). The arguments from the principles of law relating to estoppel, and *bona fide* holder for value without notice, and from the maxim that no one shall take advantage of his own wrong, and that every one must account for benefit received (subject to the rule *in pari delicto*), do certainly prove that cases coming within the provisos of (4) call for the interference of the court in order to establish justice; but they do not prove that, in order to do this, it is necessary to sustain a direct action on the contract. The legislature may say, this contract shall not be void, it shall be enforced between the parties, and the only consequence of the excess of power shall be a penalty or forfeiture attaching to the corporation, if the government sees fit to enforce it. When such legis-

lative intent is clear, the cases fall within (3), and it is proper that the plea of *ultra vires* should not be allowed.

But when there is no clear evidence of such legislative intent, it seems a very queer statement that the law will enforce a suit based directly upon a contract which that same law has declared should not be made, on the idea that the sovereign alone can object. The sovereign *has* already objected, and the law should not recognize the contract as a contract, except to punish. If one party has notice that the transaction is in violation of law, and the other has not, the first should not be allowed to set up the plea of *ultra vires*, for that would be to allow him to take advantage of his own bad faith; but when both parties had notice, the plea should be allowed, for otherwise one who had notice might gain by his violation of law, and the party who sets up the plea is no worse than the other, and does not thereby save himself from a just loss, but from an illegal loss. In every case, the object should be to prevent gain from the violation of law, to repress evil conduct.

The law may always recognize the facts of the case, and enforce the contract implied by law on the circumstances, and thus do substantial justice without the ignominy of enforcing its own violation. The difference in the practical results of the two methods of thought are slight in many cases, which fact, together with the desire for simplicity and avoidance of circuity of action, has led the courts to the present rule. But it is certainly to be regretted as breaking the consistency of the law; and beside, the results of the two rules are not always the same. Suppose a bank makes an *ultra vires* contract with B. for the delivery to it of goods at a future day, (intending to buy and sell for a profit, i. e. traffic or speculate,) and pays for them by rendering service; and before the day of delivery, the goods rise very much in value, and B. in supplying the goods would be at an expense double the value of the service rendered to him, the benefit of which, however, he may not be able to relinquish, as he cannot return their efforts to them, nor perhaps even tell precisely what are the products of this service, they having gone into his general business. Now a rule which sustains an action on the contract

because the plea of *ultra vires* cannot be set up by one who has received a benefit he retains, would give the bank the value of the goods at the time set for delivery, while justice requires that the bank should receive only the fair value of this service on a *quantum meruit*, and not double its value; the bank has no right to the goods at all, and to enforce such a contract would be to enforce a violation of law, not in order to do justice, but to do injustice and enable the bank to derive advantage from its own wrong by the aid of law. The courts would not probably carry the rule to this length, but why not have a rule that would stand analysis, viz.: —

All benefit received under an *ultra vires* transaction must be accounted for, and substantial justice will be done between the parties (subject of course to the rules *in pari* and *ex turpi causa*, which are a portion of justice themselves) in all *ultra vires* transactions upon the facts of the case and the obligations raised by the law therefrom, but no private suit directly on an *ultra vires* contract will be sustained, unless there is a clear legislative intent to that effect, or where the law of negotiability applies in favor of a *bona fide* holder without notice, or in favor of one without notice actual or constructive as against one with notice, for in such case the latter is estopped.

True rule.

§ 743. **Cases on the Effect of Informality, Directory and Imperative.** — The illegality which is set up to defeat a contract on the ground, either that the corporation exceeded its powers in making it, or that essential formalities imposed in direct and imperative terms by legislative enactments were disregarded, must go to the validity of the very contract itself, not alone to the written evidence thereof; since otherwise no *practical* advantage will result to the party setting it up. The matter has been very thoroughly discussed in several important cases in New York, and this doctrine has by no means escaped severe criticism. But in spite of criticism it has been too firmly established to be considered open to doubt. The series of causes known as the "Utica Insurance Company Cases" form the basis of the

Neglect of *imperative* formality prevents recovery on the express contract, but not on the contract raised by implication of law on the facts.

adjudication, of which the result is, that where certificates of deposit, bonds, or other instruments expressing contracts, are issued, which the corporation had not power to issue, the holder cannot enforce them and sue upon them as contracts. If he undertakes to do so he will be defeated by their illegality. But he may abandon them and go upon the original cause of action, which was the deposit with or the loan to the bank, and then he will be allowed to recover. The document issued cannot itself be sustained; but if it is abandoned altogether, the fact of its wrongful issue will not operate to prevent the success of a suit for money had and received.[1] *A fortiori*, recovery could be had in such a suit, by virtue of this doctrine, where the instrument issued was not intrinsically illegal, but was only rendered so by reason of its not being executed with precisely the formalities demanded in the incorporating act.[2] But where the instrument is negotiable paper of any description, and perhaps even in other cases, the fact that it has not been signed by the officers of the bank who are designated in the organic law as the persons who shall sign, does not even invalidate the contract itself in the hands of a *bona fide* holder, unless the same statute expressly and in terms enacts that an instrument not so signed *shall be void*. The mere declaration that contracts "*shall be signed*" by certain officials, only points out the shape in which, if any contract be executed, it shall be imperatively regarded as sufficiently executed. But

Contracts "shall be signed," &c., only directory.

[1] § 743. Utica Ins. Co. *v.* Scott, 19 Johns. 1; Utica Ins. Co. *v.* Kip, 8 Cow. 90; Utica Ins. Co. *v.* Cadwell, 3 Wend. 296; Utica Ins. Co. *v.* Kip, id. 369; Utica Ins. Co. *v.* Bloodgood, 4 id. 652; cited and approved in Curtis *v.* Leavitt, 15 N. Y. 9; Boisgerard *v.* New York Banking Co., 2 Sandf. Ch. 23; Philadelphia Loan Co. *v.* Towner, 13 Conn. 249; Robinson *v.* Bland, 2 Burr. 1077; Cundy *v.* Marriott, 1 Barn. & Ad. 696; Wilson *v.* Wysar, 4 Taunt. 288. By implication, the same doctrine is sustained by Chancellor Walworth in Safford *v.* Wyckoff, 4 Hill, 442, where, upon a written contract improperly executed, he thought plaintiff should not be allowed to recover "without showing that he has paid money thereon, which has been applied to the use of the association, so as to create a contract by operation of law."

[2] See Chancellor Walworth, in Safford *v.* Wyckoff, 4 Hill, 442.

it does not necessarily deprive the corporation of the right to delegate to its officers power to make contracts which shall be valid without these specified signatures. If the statute contains no positive prohibition, depriving the association of the right to appoint other agents to contract and sign on its behalf, such deprivation will not follow as an implication from the mere statement that contracts "shall be signed by" designated officers. "Where the associates have not lodged the power elsewhere, where the matter is to be determined upon the statute alone, without any action of the artificial body, contracts within the scope of its general powers must be signed by the officials appointed in the statute. But the statute was not designed as an appointment of particular agents, to the exclusion of all right in the corporate or associate body itself to appoint other agents to do lawful acts and enter into lawful contracts." Such was the language of Judge Comstock in the case of Barnes *v.* The Ontario Bank,[3] following the decision in the earlier case of Safford *v.* Wyckoff.[4] Since these decisions, the question seems to have been regarded as laid at rest in New York. But the views of Chancellor Walworth, expressed to a somewhat different effect in the last-named case, though overruled by a majority of the Senators, will doubtless suffice with some minds to throw a doubt upon the propriety of this ultimate conclusion. The practical inconveniences which would result from the contrary ruling are forcibly put by Judge Comstock. But it is a fair criticism, that these show the imperfection of the enactment, and should be cured by legislation; while Chancellor Walworth's simple remark, "When the legislature declare that all contracts made by these associations *shall* be signed in a particular way, I am not prepared to admit that the court is authorized to say that a valid written contract may be made in a different form," may express a more sound position than that to which Judge Comstock is brought by his ingenious flanking movement.

Contra, Walworth held the provision imperative.

§ 744. **Any positive Words in the Statute, declaring that Contracts executed otherwise than as provided shall not be**

[3] 19 N. Y. 152.

[4] 4 Hill, 442.

Binding, of course, avoid the entire Controversy. — But where such words do occur, or where the courts are unwilling to adopt the subtlety of Judge Comstock for the purpose of evading their meaning, the further question arises, To what contracts does the regulation apply? The technical language of the law might make the word "contract" cover every indorsement, every bill of exchange, and possibly even every check or draft which the cashier might be obliged to make or sign in the ordinary course of business. Every petty agreement occurring in the daily routine might come within its scope. The machinery of banking business, in its simplest parts, would become intolerably cumbrous. It is obvious that this could not have been the intent of the framers of such statutes. The courts have accordingly given a reasonable construction, and one somewhat more narrow than the ordinary broad one of the common law, to the word "contract," when thus used. It has been held not to *restrict the power of the cashier to draw, sign, and indorse bills of exchange, drafts, checks, and the like instruments*, since the power to do so is by the usage of business universally understood to be inherent in his office, and has often been so declared by the courts.[1] Chancellor Walworth, in his opinion before referred to,[2] also says, this term "contract" does not, "of course, include a class of contracts that are never in fact made by the association, but which arise by operation of law merely; as, in the ordinary case of an implied assumpsit to repay moneys deposited by dealers with the bank. In such case, the certificate of the cashier or teller, or the entry in the pass-book of the customer, is not a contract; it is only evidence of a fact, which might be proved by parol, to raise an implied promise by operation of law."

But do not affect contracts in daily routine not in fact made by corporation.

[1] § 744. Angell and Ames on Corporations, § 300; Merchants' Bank *v.* Central Bank, 1 Kelly, 418; Carey *v.* McDougald, 7 Ga. 84; Mechanics' Bank of Alexandria *v.* Bank of Columbia, 5 Wheat. 326; Northern Bank of Kentucky *v.* Johnson, 5 Coldw. 88; Jones *v.* Hawkins, 17 Ind. 550; Allison *v.* Hubbell, id. 559.

[2] Safford *v.* Wyckoff, 4 Hill, 442.

Cases.

§ 745. **The Plea of Ultra Vires cannot be set up against Persons acquiring Rights under a Transaction Ultra Vires by Circumstance unknown.** — Where the bank issues its promise to pay in a form in which it has a right to issue promises to pay, but under circumstances which render the issue of this especial promise illegal and void as *ultra vires*, the contract may be enforced against the bank by a *bona fide* holder for value and without notice. Thus, for example, it is a general rule that a bank has no power to engage as surety for another in a business in which it has no interest and from which it can derive no profit. Therefore it has no right to become an accommodation indorser. If it does so, the indorsement will be utterly void in the hands of any person having notice of the fact that it was made for accommodation. But inasmuch as a bank may become an indorser for divers legal purposes, and the contract can therefore show upon its face no signs of invalidity, it will be treated as valid in the hands of a holder for value without notice of the facts.[1]

(*a*) In a recent case in Connecticut,[2] the treasurer of the Howe Company was authorized by vote of the directors to accept bills on the company. The company under its charter had no power to accept accommodation paper. S., having no funds with the Howe Company, drew a bill on it which the treasurer accepted. The plaintiff discounted the bill, not knowing its accommodation character, and the court held that he could recover as a *bona fide* holder for value without notice, Park, C. J. dissenting, because he thought it clear on the facts that the plaintiff had notice. The remarks of the court are very instructive: "We may admit generally that the treasurer had no authority to accept accommodation paper, and that the directors had no

Conn., 1887. Accommodation paper. *Bona fide* holder for value without notice can recover in spite of *ultra vires*.

[1] § 745. Safford *v.* Wyckoff, 4 Hill, 442; Vallett *v.* Parker, 6 Wend. 615; Bank of Genesee *v.* Patchin Bank, 3 Kern. 309. See also argument and citations per Beardsley, in Leavitt *v.* Palmer, 3 Comst. 19 (pp. 24, 25).

[2] Credit Co. *v.* Howe Machine Co., 54 Conn. 387–389.

power to confer upon him such an authority. *But in order to prevent injustice and maintain the integrity of mercantile paper, it is necessary to limit the application of the principle to parties with notice.* This limitation necessarily results from the fact that every business corporation has power to deal in negotiable paper in the line of its business. As such paper does not ordinarily show on its face the circumstances of its origin or the purpose for which it is made, it becomes important to distinguish those who have notice of its character and purpose from those who have not. We pass now to the second branch of the proposition, — that persons dealing in commercial paper of a corporation are bound to take notice of the extent of its power. Here, too, we may properly admit that the proposition is a correct one; but care should be exercised in its application not to extend it beyond its appropriate limits. *To clearly understand those limits, a distinction is to be observed between the terms of a power and the circumstances under which it is exercised.* Parties may well be required to take notice of the former; but to require them to have knowledge of the latter would, in many cases, result in gross injustice. Especially is this so where the agent or officer of the corporation who exercises the power at the same time represents the corporation, and speaks for it in giving information as to the circumstances under which it is exercised. No better illustration is needed than the case at bar. The treasurer of the defendant was the officer specially authorized, by vote of the directors, to accept bills of exchange; at the same time, by virtue of his office, he was the person held out by the corporation as the proper one to inform holders whether the drawer draws against funds. The corporation virtually says, 'You may safely trust the word of our treasurer on that subject.' When he speaks, the corporation speaks. By accepting the draft he declares that the drawer has funds, and that is the declaration of the corporation. Mercantile paper does not require those who would become its holders to go to the acceptor and insult him by the question, Did you tell the truth when you accepted that paper? They have a right to assume that he tells the truth, and to act accordingly. If the

treasurer in fact misrepresents the corporation, the corporation, and not the person who trusts him, should bear the loss. An instructive and very interesting case on this subject is Farmers and Mechanics' Bank *v.* Butchers and Drovers' Bank (16 N. Y. 125). The defendant's counsel cite that case, and quote from it this sentence: 'One who deals with an agent has no right to confide in the representations of the agent as to the extent of his powers.' The court, however, clearly recognize the distinction to which we have adverted, — namely, between the terms of a power, and extrinsic facts, which may or may not, according to the circumstances, affect the rights of third persons when the power is exercised. That was an action on a certified check. The defence was that the bank had no funds of the drawer. Immediately following the sentence quoted, the court uses this language: 'If therefore a person, knowing that the bank has no funds of the drawer, should take a certified check, upon the representation of the cashier or other officer by whom the certificate was made that he was authorized to certify without funds, the bank would not be liable. But in regard to the extrinsic fact, whether the bank has funds or not, the case is different. That is a fact of which a stranger, who takes a check certified by the teller, cannot be supposed to have any means of knowledge. Were he held bound to ascertain it, the teller would be the most direct and reliable source of knowledge, and he already has his written representation upon the face of the check. If therefore one who deals with an agent can be permitted to rely upon the representation of the agent as to the existence of a fact, and to hold the principal responsible in case the representation is false, this would seem to be such a case. It is, I think, a sound rule, that where the party dealing with an agent has ascertained that the act of the agent corresponds in every particular, in regard to which such party has or is presumed to have any knowledge, with the terms of the power, he may take the representation of the agent as to any extrinsic fact which rests peculiarly within the knowledge of the agent, and which cannot be ascertained by a comparison of the power with the act done under it.'"

Though a contract is in excess of the powers of a company, if not in violation of express charter provisions, or of any statute prohibiting it, and the company has by its promise induced another relying on it to expend money on the contract, the company is liable thereon.[3]

§ 746. **Cases in which the Plea of Ultra Vires is sustained,** either because the contract was *malum in se;* or because it was expressly declared void, or the court deemed that this was the legislative intent (and on this point it is instructive to compare the Fowler case, § 747, with the United States decision in Union National Bank *v.* Mathews, § 754, and the Maryland case of Lester *v.* Howard Bank, § 751); or because of the coexistence of two facts, viz. that the party against whom the plea was set up had reasonable notice of the *ultra vires* character of the transaction, or if he had no notice, yet had not parted with any value or sustained loss in the matter, and that the party setting up the plea had either received no benefit from the transaction, or, set it up, not to retain benefit for himself, but on behalf of innocent persons having a superior equity to the party against whom the plea is made, as in the last case quoted in § 749, where the bank was insolvent, and the plea was allowed for the benefit of innocent creditors.

Expansion of §§ 732, 734 b, 736.

In Western Bank *v.* Mills, the contract itself was of an illegal nature, and was especially declared void, and it was held that the bank could not sue on the notes it had discounted.[1]

In Springfield Bank *v.* Merrick, the contract was to pay in forbidden currency, an act prohibited by law under a heavy penalty, and the court held that a note payable in such currency was void, and no action could be sustained on it.[2]

In Maryland and Minnesota it has been held that a "purchase" by a bank passes no right of action on the note. (See § 73.)

The Supreme Court of New York have held that where a note was discounted at a usurious rate of interest, and the

[3] State Board of Agriculture *v.* City St. R. Co., 47 Ind. 407.

[1] § 746. Western Bank *v.* Mills, 7 Cush. 539.

[2] Springfield Bank *v.* Merrick, 14 Mass. 322.

law simply prohibited banks from entering into such usurious contracts, the contract and note were void, and could not be enforced at all, or in any part, in a suit on behalf of the bank. The case is ingeniously, but not very satisfactorily, distinguished from the cases decided in the United States Supreme Court.[3]

A similar ruling was made by the Supreme Court of Ohio, upon the strength of the case in 2 Peters, § 747. The court say, that a contrary doctrine would prevail in the case of an individual; but the bank having undertaken to act *ultra vires* has not, in law, succeeded in acting at all, and the contract is void.[4]

It is a general rule, though, as we have seen, with exceptions, that it is primarily essential to the validity of any contract to which a bank is a party that the undertaking of the bank therein should be within the scope of its legitimate powers. As it is utterly incompetent to act, so it is equally incompetent to agree or bind itself to act, in any business, for any purpose, or in any manner not authorized by the law of its corporate existence. Its assumption or promise to perform any act trespassing beyond these limits is void *ab initio*, and the fundamental defect can be cured by no subsequent proceeding short of an act of the legislature.[5]

§ 747. The two cases following, from Illinois and Pennsylvania, though overruled in consequence of the decisions of the United States Supreme Court in National Bank *v.* Mathews, are yet very instructive on the question of legislative intent, and other aspects of *ultra vires*.

A mortgage given to an officer of a national bank at the time of a loan by the bank to secure its payment, being in effect made to the bank, is void under U. S. Rev. Sts. § 5136, cl. 7, and will not be enforced by the courts.

The fact that a law creating a banking corporation pre-

[3] Seneca County Bank *v.* Lamb, 26 Barb. 595. See § 750.

[4] Bank of Chillicothe *v.* Swayne, 8 Ohio, 257; Bank of Wooster *v.* Stevens, 1 Ohio St. 233.

[5] See the Utica Insurance Company Cases, above; Bank of Chillicothe *v.* Swayne, 8 Ohio, 257; Bank of Wooster *v.* Stevens, 1 Ohio St. 233.

scribes one mode of exercising an express power, implies an inhibition of the exercise of the power in any other way.[1]

In the Pennsylvania case,[2] Fowler gave to a national bank, not being then indebted to it, a mortgage to secure the bank for notes, &c., *thereafter* to be discounted for him. Held, —

1. That under the National Currency Act, June 3, 1864, the mortgage was void.

2. Lending money by a national bank on mortgage or real estate security is *ultra vires*, and forbidden.

3. The mortgage being void, no action on it could be sustained.

4. Courts, even with the consent of the defendant, will not enforce a contract in violation of a statute, although not expressly made void.

5. *If a plaintiff cannot open his case without showing that he has broken the law, courts will not assist him to recover, whatever his justice may be.*

"The banking powers of these associations are to be found in the eighth section, and are 'to carry on the business of banking by *discounting* and *negotiating* promissory notes, drafts, bills of exchange, and other evidences of debt; by buying and selling exchange, coin, and bullion; by loaning money on *personal* security; by obtaining, issuing, and circulating notes according to the provisions of the act.' In view of the rule of interpretation of such charters given to us by the Federal courts, and the maxim, *Expressio unius est exclusio alterius*, the argument might close with the terms of the power to loan money on *personal* security; for agreeably to this rule and maxim, no other security than personal can be taken for money lent. . . .

"Now comes the prohibition against any other mode, and the appointed time, such as shall have been legally acquired, shall be held: 'Such association shall *not* purchase *or* hold real estate in any *other case* or for any *other purpose* than as *specified* in this section, nor shall it hold possession of any real estate under mortgage, or hold the title and possession of

[1] § 747. Fridley *v.* Bowen, 87 Ill. 151.

[2] Fowler & Vankirk *v.* Scully, 72 Pa. St. 456 (1872).

any real estate purchased to secure any debts due to it, for a longer period than five years.' . . .

"If anything were wanting to make plain that which is clear, it is the amendment of the second clause in the twenty-eighth section, and the debate on it in the Senate. See Congressional Globe, April 26, 1864. The amendment of the committee proposed to strike out 'for loans made by such association in the usual course of its banking business, or for money due thereto,' and to insert 'for debts previously contracted,' so as to make the clause read, 'such as shall be mortgaged to it in good faith by way of security for debts previously contracted.' At the call of Senator McDougall, Senator Sherman explained the amendment of the committee to allow the banks to take a mortgage for a pre-existing debt, but not to loan money on real estate security. 'Not to loan money on mortgage?' said Mr. McDougall. Mr. Sherman again replied, 'They have no right to loan money on mortgage; they must take personal security; but after a debt is contracted they may, in order to secure the debt, take a mortgage upon real estate.' The amendment was adopted, and the section now stands so.

"*The doctrine that a contract in violation of the provisions of a statute, though not expressly made void by it, is null, and will not be enforced by the courts, is very distinctly stated, and sustained by authorities*, in the case of the Bank of the United States *v.* Owens (2 Peters, 538). Johnson, J. said: 'No court of justice can in its nature be made the handmaid of iniquity. Courts are instituted to carry into effect the laws of the country; how can they become auxiliary to the consummation of violations of law? There can be no civil right where there can be no legal remedy, and there can be no legal remedy for that which is itself illegal.' The same principles are recognized in Coppell *v.* Hall (7 Wallace, 558). Justice Swayne, commenting on the instruction of the court below, that the illegality had been waived by the act of the defendant, says: 'In such cases there can be no waiver. The defence is allowed, not for the sake of the defendant, but of the law itself.' Again: 'Whenever the illegality appears, whether the evidence comes from one side or the other, the disclosure is fatal

to the case. No consent of the defendant can neutralize its effect. A stipulation in the most solemn form to waive the objection, would be tainted with the vice of the original contract, and void for the same reasons. Where the contamination reaches, it destroys. The principle to be extracted from all the cases is, that the law will not lend its support to a claim founded on its own violation.' . . .

"'The test,' says Judge Duncan, in Swan *v.* Scott (11 Serg. & R. 164), 'whether a demand connected with an illegal transaction is capable of being enforced at law, is whether the plaintiff requires the aid of the illegal transaction to establish his case. If the plaintiff cannot open his case without showing that he has broken the law, the court will not assist him, whatever his claim in justice may be upon the defendant.'"

§ 748. In Webster *v.* Howe Machine Company [1] the facts were similar to those in the case of the Credit Company *v.* Howe Machine Company (§ 745 *a*), but in this case the plaintiff was not a holder for value; he discounted a bill accepted for accommodation by the Howe Company, but he applied the proceeds on a debt of the drawer to them, and did not discharge the debt or relinquish anything of value, and therefore the facts necessary to exclude the plea did not exist. No injustice could be done by allowing it.

Party by whom pleaded no benefit. Party against whom, had notice.

A.'s land was sold for his debt to R. It was then bought by the C. bank, and by it sold to the E. bank, the latter purchase being *ultra vires* the charter. E. brought suit to recover the land from A., who was in possession, and the court said that, although A. had neither legal nor equitable right, it could not assist E. A. could plead *ultra vires*, although subsequent to bringing the action a statute was enacted ratifying the purchase by E.; the court saying, that the judicial department was independent of the legislative, and could brook no interference as to the decision of *existing* cases. A ratification before suit would have a different effect.[2]

§ 749. The trustees of a savings institution subscribed for

[1] § 748. Webster *v.* Howe Machine Co., 54 Conn. 391.

[2] Thweatt *v.* Bank of Hopkinsville, 81 Ky. 1.

$50,000 of the capital stock of the C. company, and, the trustees having *no money to pay for it*, no funds in the treasury, the F. company paid that amount to the C., taking the notes of the savings institution therefor, and a certificate of the stock in the F.'s own name as collateral. Held, that the subscription was *ultra vires;* that the F. was not a *bona fide* holder of commercial paper; and that the *savings institution, having received no benefit from the transaction, was not estopped to set up the defence of ultra vires.*[1] The trustees in this case had no power to purchase *on credit* property of any kind not needed for immediate use. One who *knowingly* takes as collateral security drafts of a national bank drawn *for the accommodation* of a customer, cannot recover in a suit against the bank in the hands of a receiver.[2]

Party by whom, no benefit. Party against whom, notice.

(*b*) Under the Tennessee Act of 1860, modifying the Tennessee Code, §§ 1814, 1817, holders of bank notes are presumed to have notice of all that appears on their face, and in the charters and laws under which the banks were organized. As *between the creditors* of an insolvent bank, those whose debts were created under the lawful power given by the charter *must be preferred* to those who *claim under a contract* that the bank under its charter had no power to make. In such case the bank is not estopped from denying the illegality or want of power to make the contract.[3]

Notice.

Real party for whom the plea is made in this case has a superior equity.

§ 750. The plea cannot be set up for his own sake by one who has received and retained a benefit under a transaction not *malum in se* nor expressly void; nor in case of violation of a statutory provision when it is clear that the legislative intention was not to render transactions void because of such violation, but only to subject one or other party to a penalty or forfeiture. The two principles are so linked in the cases that we will illustrate them together.

For complete statement, see §§ 733, 734 *a*, 735.

[1] § 749. Franklin Company *v.* Lewiston Inst. for Savings, 68 Me. 43.

[2] Johnson *v.* Charlotteville National Bank, 3 Hughes, 657.

[3] Bank of Chattanooga *v.* Bank of Memphis, 9 Heisk. 408.

Ultra vires loan.

One who has borrowed money from the bank cannot, after he has thus received the benefit of the contract, repudiate the obligation which it imposes upon himself, on the ground that the bank in making the loan exceeded its corporate powers, or acted otherwise improperly or illegally;[1] neither on the ground of any original informality or irregularity in the formation of the company under the law of its corporate existence.[2] Efforts of this nature to avoid the performance of their undertakings are usually based by debtors upon the infringement of clauses in the charter or organic law, which are so phrased or relate to such matters that the courts regard them as directory merely. These usually relate to the number of directors who shall have authority to make the loan; to the absolute amount, or the proportion of the capital stock, which shall not be exceeded in any individual loan; to the amount or kind of the security to be taken, or to the manner in which it shall be taken; and other like concerns. The breach of these and similar provisions may subject the corporation to penalties at the process of the State authorities, but it does not avoid the contract which it affects.[3]

Taking interest beyond charter limit.

It has been urged, that if the bank is prohibited from entering into any contract whereby it is to receive more than a certain specified rate of interest, then any contract which it undertakes to enter into, in contravention of this rule, must be void, as being one which the corporation is absolutely forbidden, and therefore is abso-

[1] § 750. Parish *v.* Wheeler, 22 N. Y. 494; Smith *v.* Bank of the State, 18 Ind. 327; Bradley *v.* Same, 20 id. 528; Bank of Middlebury *v.* Bingham, 33 Vt. 621; Planters' Bank *v.* Sharp, 4 Sm. & Mar. 75; Shoemaker *v.* National Mechanics' Bank, 2 Abb. U. S. 416; Stewart *v.* National Union Bank, id. 424; Elder *v.* First National Bank of Ottawa, 12 Kans. 238. See Allen *v.* First National Bank of Xenia, 23 Ohio St. 97.

[2] Allison *v.* Hubbell, 17 Ind. 559; Southern Bank *v.* Williams, 25 Ga. 534.

[3] See the cases cited in the two preceding notes; also Moreland *v.* State Bank, 1 Breese, 203; Bond *v.* Bank of Georgia, 2 Kelly, 92; Bates *v.* State Bank, 2 Ala. 451; also the same subject in the chapter on National Banks.

lutely powerless, to make. But though this view seems in a measure plausible, yet it has not been sustained by the best authorities. Fleckner *v.* The Bank of the United States[4] is a leading case on the subject, and the reasoning of Mr. Justice Story therein is satisfactory. The act of incorporation said, "Nor shall it [the bank] take more than at the rate of six per centum per annum for or upon its loans or discounts." Having first shown that the holding back of the amount of interest at the time of lending the money was not to be considered an infringement of this provision, Judge Story proceeded to say: "If indeed the law were otherwise, it would not follow that the transfer to the bank of the present note would be void, so that the maker of the note could set it up in his defence. The statutes of usury of the States, as well as of England, contain an express provision, that usurious contracts shall be void; and without such an enactment the contract would be valid, at least in respect to persons who were strangers to the usury. The taking of interest by the bank beyond the sum authorized by the charter would doubtless be a violation of its charter, for which a remedy might be applied by the government; but as the Act of Congress does not declare that it shall avoid the contract, it is not perceived how the original defendant could avail himself of this ground to defeat a recovery." Such a clause in the incorporating act would seem therefore to be directory merely. Infringement of it may subject the bank to proceedings, perhaps for the forfeiture of its charter, by the proper governmental authorities. But the contract itself, which is tainted with the disobedience, will not be void *in toto*, since the law, in order to have this effect, should have expressly so declared. It may be stated, as a rule of interpretation of such interest clauses in incorporating laws, that they will be construed in accordance with the analogy of decisions rendered under statutes of usury, similarly phrased. If the language expressly declares what shall be the effect of taking an illegal rate of interest, the matter is, of course, thereby put beyond the possibility of discussion. But if the

U. S. S. C. Only sovereign can object.

[4] Fleckner *v.* Bank of United States, 8 Wheat. 338.

language is simply confined to the expression of the prohibition, stating what "shall not" be done, without more, then the law asserted by Judge Story must be regarded as established. Indeed, very little desire to depart from it has ever been manifested.[5]

The cited case, Bank of United States *v.* Waggener, draws a fine distinction in phraseology, which ought, perhaps, to be noticed in this connection. The cause is first reported in 2 Peters, 527 (under the name of Bank of United States *v.* Owens), and there, in respect to interest, the word "reserving" is declared to be included in the word "taking." So that whatever consequences are declared to attach to the "taking" illegal interest must attach likewise to the "reserving" it. But in the second decision the court reverse this conclusion, and declare that reservation is quite a different thing from a taking, and may entail entirely different results in its effect upon the contract. If the statute enacts that "reserving" shall avoid the transaction, it does not therefore follow that "taking" will also avoid it; and *vice versa*. The point is certainly a very subtle one, but it is carefully defined and strongly asserted by the court. It introduces another element of complication into a matter which certainly needed no such addition to its former difficulties.

Distinction between reserving and taking interest.

A bank receiving the benefit of a contract cannot set up the plea of *ultra vires*.[6]

Real estate securities taken by a national bank in violation of the law are not void, but only voidable; the sovereign alone can object.[7]

[5] See also Bank of United States *v.* Waggener, 9 Pet. 399; Bandel *v.* Isaac, 13 Md. 202; Farmers' Bank *v.* Burchard, 33 Vt. 346; Rock River Bank *v.* Sherwood, 10 Wisc. 230; Bank of Middlebury *v.* Bingham, 33 Vt. 621; Planters' Bank *v.* Sharp, 4 Sm. & Mar. 75; Farmers & Traders' Bank *v.* Harrison, 57 Mo. 503. See also Orr *v.* Lacey, 2 Dougl. 252. But in examining all the cases special attention must be paid to the precise wording of the enactments under which they arise.

[6] Ward *v.* Johnson, 95 Ill. 240. See also 95 Ill. 215.

[7] Warner *v.* DeWitt County National Bank, 4 Ill. App. 305 (1879); following Union National Bank *v.* Mathews, 98 U. S. 261.

(*a*) The prohibition in the Maine Revised Statutes, c. 47, § 14, against discounts by a bank of paper not having at least two names thereto, is intended for the security of the stockholders, and not for the benefit of one who borrows on such paper. It was meant to protect the shareholders from the carelessness of directors, and not to punish the innocent stockholders by relieving debtors from their just obligations to the bank.[8] So § 91, prohibiting savings banks from loaning money on security of names alone, is directory merely, for the protection of depositors, and does not prevent the bank from enforcing a note bought in violation of the provision.[9]

§ 751. A savings bank's discounting a note *ultra vires* is no defence to its suit on the note.[1] We give the substance of a very instructive case[2] in Maryland: —

"The rule of law is well settled that no action will lie to enforce a contract *malum in se*, nor, if executed, to recover money paid under it. In all such cases, the maxims, *Ex turpi causa non oritur actio*, and *In pari delicto potior est conditio defendentis et possidentis*, apply. In Williams *v.* Headley (8 East, 378), where an action was brought to recover money which had been paid by the plaintiff to the defendant to compromise a *qui tam* action brought by the defendant against the plaintiff, contrary to the provisions of a certain statute, it was held that the principle *in pari delicto* did not apply, because it was the purpose of the statute to punish the party who sues in order to extort money, and not the person who might be the victim of such extortion. This appears, said Lord Ellenborough, 'to have been the *true sense* and *intention* of the legislature.' Whether the action was maintained in these cases upon the ground that the principle of *pari delicto* did not apply, because the contracts were prohibited by statutes passed for the purpose of preventing one set of men from taking advantage of the necessities of others,

[8] Roberts *v.* Lane, 64 Me. 108 (1874).

[9] Farmington Savings Bank *v.* Fall, 71 Me. 49.

[1] § 751. United German Bank *v.* Katz, 57 Md. 128.

[2] Lester & Wife *v.* Howard Bank, 33 Md. 562.

or upon the broader ground taken in some of the American cases, that the statutes *designated the criminal by prescribing punishment against one party to the contract only*, is, in our view, and for the purposes for which they are referred to, quite immaterial. They prove conclusively that one common *consequence does not attach to every contract made in violation of positive law*, and, further than this, that in determining the question as to whether the maxim of *pari delicto* will operate as a bar to relief, courts will look to the statute itself, — the object and purposes for which it was passed, — in order to ascertain, in the language of Lord Ellenborough, 'the true sense and intention of the legislature.' And accordingly, in Harris *v.* Runnels (12 How. 80), the Supreme Court, while acknowledging, as a general rule, that contracts made in contravention of statutory law are void, admit that the rule is subject to many exceptions, made upon distinctions very difficult to be understood consistently with the rule, 'so much so,' say the court, 'that we have concluded before the rule can be applied in any case of a statute prohibiting or enjoining things to be done, with a prohibition and a penalty only for doing a thing which it forbids, that *the statute must be examined as a whole to find out whether or not the makers of it meant that a contract in contravention of it should be void, or that it was not so to be.* In other words, whatever may be the structure of the statute in respect to prohibition and penalty, or penalty alone, that it is not to be taken as granted that the legislature meant that contracts in contravention of it were to be void, in the sense that they were not to be enforced in a court of justice. In this way the principle of the rule is admitted without at all lessening its force, though its absolute and unconditional application to every case is denied.' The court further add, that '*when the statute is silent, and contains nothing from which the contrary can be properly inferred, a contract in contravention of it is void.*'"

§ 752. In an early case[1] the company capital was required by the charter to be paid at a certain time, and invested in a specified manner. Instead of conforming to the law, the com-

[1] § 752. Little *v.* O'Brien, 9 Mass. 426.

pany took the promissory notes of stockholders. In suit on a note against a stockholder, the court said, that for such misbehavior the government might seize the franchise, but it did not lie in the mouth of the stockholder and maker of the note to raise the objection of *ultra vires*, for as between him and the company the note was on good consideration.[1] Benefit received, and legislative intent.

Again, in Massachusetts, a company sold goods to one Dewey. On suing for the price, D. pleaded that the sale was *ultra vires*. Parker, C. J., said that the government only could take advantage of that fact.[2]

Minnesota formerly held that a note *purchased* by a State or national bank could not be recovered on.[3] As to national banks, this position has been overruled to conform to the principles laid down by the United States Supreme Court in National Bank *v.* Whitney (§ 754).[4]

In a New Hampshire case the court said: "The doctrine of *ultra vires* is not usually applied where the party setting it up has received a benefit from the unempowered and unlawful act relied on as a defence. Rich *v.* Errol, 51 N. H. 350, 354; West *v.* Errol, 58 N. H. 233; United States *v.* State Bank, 96 U. S. 33; Gold Mining Co. *v.* National Bank, 96 U. S. 640; National Bank *v.* Mathews, 98 U. S. 621; National Bank *v.* Whitney, 103 U. S. 99. The defendants received a tract of land which the plaintiff conveyed, relying for payment of the consideration on the guaranty of the defendants. The guaranty, the conveyance, and the pledge of the note and mortgage, were parts of the same transaction, and though the land was not received directly from the plaintiff, it was the false guaranty which induced and made possible the conveyance, and which enabled the bank to collect the overdraft of Lamprey. It was a benefit received from the guaranty, and the defendants cannot be permitted to repudiate the unauthorized contract and retain the fruits of it. If the guaranty is denied, the benefit must be restored. The plaintiff cannot recover upon the guaranty. If he desires, he may amend his declaration by adding

[2] Chester Glass Co. *v.* Dewey, 16 Mass. 94.

[3] See § 73.

[4] Merchants' National Bank *v.* Hanson, 33 Minn. 40.

an appropriate count for the recovery of the land, or its value, if sold." [5]

Legislative intent.

§ 753. A national bank discounting a note at an illegal rate does not prevent its recovery of the full amount of principal and interest due thereon. Only the party with whom the bank had the usurious transaction can recover, under U. S. Rev. Sts., §§ 5197, 5198. The maker of a valid note cannot avail himself of *ultra vires* in the consideration.

When a national bank violates a provision to which the law attaches forfeiture of franchise or a penalty, only the Government through the comptroller can take advantage of it. Everywhere a bank is held to recover money loaned on a usurious contract, though the interest is forfeited.[1] A national bank can recover money loaned beyond the lawful limit of one tenth of its capital paid; the contract is not void, but may be enforced.[2] "The rule is not for the benefit of either party to the illegal contract, but is based on public policy." It is to be noted that this broad ground would apply to all cases *in pari delicto*, and that the real ground of the case is that the law will not allow a party to retain a benefit arising from a transaction, and give no equivalent, unless the contract is one with which the courts cannot interfere at all, being expressly made void, or against morality or public policy, and then, when the parties are really *in pari delicto*, the law will refuse to aid either to get out of trouble he has got himself into by violating the law.

Violation of law in taking real estate security.

§ 754. A national bank can, against the mortgagor and parties claiming under him with notice, enforce a mortgage of lands executed to it as collateral security for his then existing indebtedness to it, and such as he might thereafter incur.[1]

Excessive loan.

Rev. Sts. U. S. § 5200, providing that the amount for which any one individual or firm shall be indebted to a national bank shall not exceed a certain sum, when

[5] Norton *v.* Bank, 61 N. H. 592.

[1] § 753. Stephens *v* Monongahela National Bank, 88 Pa. St. 157.

[2] Gold Mining Co. *v.* National Bank, 96 U. S. 640.

[1] § 754. National Bank *v.* Whitney, 103 U. S. 99.

such a bank violates the provision by lending to one person an amount in excess of the limit, such person cannot set up the violation of the statute as a defence to his liability on the note. If a penalty is to be enforced against the bank, it can be done only at the instance of the Government. A contract entered into by the bank in violation of this section is not void. The true rule is, that, if the bank is to be punished for a violation of the law, the Government must enforce the penalty, and not an individual. The banking law, when fully examined, does not make the contract entered into in violation of § 5200 of the Revised Statutes void, and the stockholders are not to suffer when such a claim is made, under the circumstances suggested in the record.[2]

The United States Supreme Court has decided,[3] on the strongest reasoning that can be brought to bear in favor of excluding the plea of *ultra vires*, that a national bank may take real estate security for a concurrent loan or future advances, and can enforce the deed of trust, or foreclose the mortgage, with the aid of a court of law, and no one can object but the United States. In Union National Bank *v.* Mathews, the court said: —

"Here the bank never had any title, legal or equitable, to the real estate in question. It may acquire a title by purchasing at a sale under the deed of trust; but that has not yet occurred, and never may. § 5137 has then no direct application to the case. It is only material as throwing light upon the point to be considered in the preceding section. Except for that purpose, it may be laid out of view. § 5136 *does not, in terms, prohibit a loan on real estate, but the implication to that effect is clear.* What is so implied is as effectual as if it were expressed. As the transaction is disclosed in the record, the loan was made upon the note as well as the deed of trust. *Non constat*, that the maker who executed the deed would not have been deemed abundantly sufficient without the further security. The deed, as a mortgage would have been, was an

[2] Wyman *v.* Citizens' National Bank, 29 Fed. Rep. 734.

[3] Union National Bank *v.* Mathews, 98 U. S. 621; Fortier *v.* New Orleans National Bank, 112 U. S. 439.

incident to the note, and a right to the benefit of the deed, whether mentioned or delivered or not, when the note was assigned, would have passed with the note to the transferee of the latter. The object of the restrictions was obviously threefold. It was to keep the capital of the banks flowing in the daily channels of commerce; to deter them from embarking in hazardous real estate speculations; and to prevent the accumulation of large masses of such property in their hands, to be held, as it were, in mortmain. The intent, not the letter, of the statute, constitutes the law. A court of equity is always reluctant in the last degree to make a decree which will effect a forfeiture. The bank parted with its money in good faith. Its garments are unspotted. Under these circumstances, the defence of *ultra vires*, if it can be made, does not address itself favorably to the mind of the Chancellor. We find nothing in the record touching the deed of trust which, in our judgment, brings it within the letter or the meaning of the prohibitions relied upon by the counsel for the defendant in error. In the First National Bank of Fort Dodge *v.* Haire and others, (36 Iowa, 443,) the bank refused to discount a note for a firm, but agreed that one of the partners might execute a note to the other, that the payee should indorse it, that the bank should discount it, and that the maker should indemnify the indorser by a bond and mortgage upon sufficient real estate, executed for that purpose, with a stipulation that, in default of due payment of the note, the bond and mortgage should inure to the benefit of the bank. The arrangement was carried out. The note was not paid. The maker and indorser failed and became bankrupt. The bank filed a bill to foreclose. The same defence was set up as here. In disposing of this point, the Supreme Court of the State said, 'Every loan or discount by a bank is made in good faith, in reliance, by way of security, upon the real or personal property of the obligors, *and unless the title by mortgage or conveyance is taken to the bank directly, for its use, the case is not within the prohibition of the statute.* The fact that the title or security may inure indirectly to the security and benefit of the bank will not vitiate the transaction. Some of the cases upon quite analogous statutes go

much further than this. Silver Lake Bank *v.* North, 4 J. C. R. 370.' When a statute imposes a penalty on an officer for solemnizing a marriage under certain circumstances, but does not declare the marriage void, the marriage is valid; but the penalty attaches to the officer who did the prohibited act. Milford *v.* Worcester, 7 Mass. 48. Parton *v.* Hervey, 1 Gray, (Mass.) 119. King *v.* Birmingham, 8 Barn. & Cr. 29. Where a bank is limited by its charter to a specified rate of interest, but no penal consequence is denounced for taking more, it has been held that a contract for more is not wholly void. Planters Bank *v.* Sharp *et al.*, 12 Miss. 75. Grand Gulf Bank *v.* Archer *et al.*, 16 id. 151. Rock River Bank *v.* Sherwood, 10 Wisc. 230. The charter of a savings institution required that its funds should be invested in or loaned on public 'stocks or private mortgages, &c.' A loan was made, and a note taken, secured by a pledge of worthless bank stock. The borrower sought to enjoin the collection of the note, upon the ground that the transaction was forbidden by the charter, and therefore void. The court held the borrower bound, and, upon a counter claim, adjudged that he should pay the amount of the loan with interest. Mott *v.* United States Trust Co., 19 Barb. N. Y. 568. Where a corporation is incompetent by its charter to take a title to real estate, a conveyance to it is not void, but only voidable, and the sovereign alone can object. It is valid until assailed in a direct proceeding instituted for that purpose. Leazure *v.* Hillegas, 7 Serg. & R. (Pa.) 313. Goundie *v.* Northampton Water Co., 7 Pa. St. 233. Runyon *v.* Coster, 14 Pet. 122. The Banks *v.* Poitiaux, 3 Rand. (Va.) 136. McIndoe *v.* City of St. Louis, 10 Mo. 577. See also Gold Mining Co. *v.* National Bank, 96 U. S. 640. It would be in the *highest degree inequitable and unjust to permit a defendant to repudiate a contract, the benefit of which he retains. We cannot believe it was meant that stockholders, and perhaps depositors and other creditors, should be punished and the borrower rewarded*, by giving success to this defence whenever the offensive fact shall occur. The impending danger of a judgment of ouster and dissolution was, we think, the check, and none other, contemplated by Congress. That has been

always the punishment prescribed for the wanton violation of a charter, and it may be made to follow whenever the proper public authority shall see fit to invoke its application. A private person cannot, directly or indirectly, usurp this function of the government."

§ 755. The only penalty for violating § 5198 is the loss of interest; the note is not void, though a State law may declare that usurious paper shall be entirely null and void.[1] The question of *ultra vires* in the case of a national bank is between the Federal Government and the bank exclusively, and cannot be inquired into in a suit between the parties to the transaction.[2] This language is rather sweeping, and must be viewed as referring to the facts of the case. A by-law prohibiting a transfer of national bank stock while the holder is indebted to the bank is void, under § 5201 of the Revised Statutes, forbidding loans on security of their own stock, and certainly would not need a suit by the Government before the courts would refuse it support, and other cases may easily be added.

(*a*) A bank received a deposit of $3,000 under a contract in violation of its organic law, but made by the cashier in pursuance of orders from the directors, and Pennsylvania held that, as between the bank and the contracting party suing to recover the deposit, the bank could not take advantage of the *ultra vires* character of the contract.[4]

Benefit retained.

(*b*) Suit was brought to recover moneys loaned by a bank upon certain drafts which were dishonored. The defendants answered, that the bank, in advancing the money, violated its charter and exceeded its powers; that it was unlawfully carrying on the business of banking with the funds of depositors held by it in trust and for other purposes specified in its charter; and therefore the plaintiff had no right of action. Held, that under the

Plea not allowed to one receiving the benefit of the transaction.

[1] § 755. Farmers & Mechanics' Bank *v.* Dearing, 10 U. S. 29.

[2] Bank *v.* Elmore, 9 Rep. 110 (Iowa).

[3] Feckheimer *v.* National Exchange Bank of Norfolk, 79 Va. 80.

[4] Hagerstown Bank *v.* London Savings Fund Soc., 3 Grant, 135.

charter the bank was a trustee for all funds deposited, and the moneys deposited were trust funds; that, although the transaction was unlawful and unauthorized, and subjected the bank to be proceeded against as for a forfeiture of its franchise, it did not lie with one who had thus obtained its funds and impaired the security of its depositors and the public to consummate a fraud against them by such a plea.[5]

§ 756. **The True Distinction.** — One of the most interesting cases in the books on the subject of *ultra vires* is Bissell *v.* Michigan Southern Railroad Co.[1] Two corporations, chartered respectively by Michigan and Indiana, had each power to build and operate a road in its own State. They united in the business of transferring passengers over a third road in Illinois. One of these passengers (D.) was hurt by an accident on the latter road, resulting from the negligence of the employees of this *ultra vires* combination. It was admitted that the business was *ultra vires*. The court was not in unison. Comstock said that D. could recover in *contract*, for the plea of *ultra vires* must not be admitted where its allowance would be a greater injustice to innocent parties than the breach of trust is to the shareholders. A corporation must be held bound by its acts, when to repudiate them would be a manifest wrong to others. *Ultra vires* does not mean that the company *did* not contract to carry D., but that as to the shareholders and as to the government it *ought* not to have done it. A dissent in New York.

Now it is perfectly clear that the decision in this case resulted in substantial justice. A company receiving the benefit of a business should not be allowed to take advantage of its own wrong to escape the liabilities of the business. By its *ultra vires* acts, it wronged the public of which D. was (perhaps) a part; shall it escape liability to D. for an injury done to him because it has previously done him another injury? But though in substance right I am compelled to agree with the dissent of Selden: "If anything is settled it is that the assumption of any unauthorized power by a corporation is a

[5] Allen *v.* Freedman's S. & T. Co., 14 Fla. 418.

[1] § 756. Bissell *v.* Michigan Southern Railroad Co., 22 N. Y. 258.

violation of public policy and public right, and therefore illegal and void; the company then had no right to contract, and there could not be a valid contract under such circumstances; yet the company must be held liable to D., just as any railroad is liable for a negligent injury to one who is riding without a contract."

In other words, the court should do justice on the facts of the case, sustaining suit for the tort, or for breach of the contract implied by law on the circumstances. But the law should avoid the appearance of evil, and neither in fact nor in terms, sustain its own violation. It should be consistent, and not stultify itself by saying, "I, the sovereign, will enforce this contract (although I have forbidden it), until I, the sovereign, shall object to it (although I have already objected decidedly)." Of course, these remarks have no application to cases which come within the principle of (3) alone. If the legislature has distinctly said, "I forbid this act under penalty, but think it best, for the stability of mercantile affairs, that among private persons the act when done should be sustained, and I trust entirely to my own direct action in the way of penalty or forfeiture," the courts have nothing to do but obey; and if, though the legislature has not in terms said the contract shall not be void, but still it is manifest that their clear intent and plain justice could not be fulfilled by holding the contract void, and proceeding on the implied contracts, then also the court cannot do otherwise than refuse to listen to the plea of *ultra vires*. And it is the difficulty of deciding as to what is the legislative intent which has produced much of the conflict in this branch of the law. In all other cases the contract of the parties should be held no contract; acting *ultra vires* is not to be recognized as acting at all, but the state of facts resulting should be inquired into, and substantial justice done, upon the principles of law and equity.

In this particular case, the two paths lead to the same house, but in some cases the practical result of the two modes of thought is very different. For illustration of this in cases which do not involve (like this one) a tort as well as a breach of contract, see §§ 743, 747.

§ 757. **In the following Cases, the True Distinction seems to be recognized. N. H., Mass., N. Y., U. S.** — A savings bank, having received special deposits out of its ordinary course of business, and appropriated them to its own use, is liable to pay their amount, and *to that extent is estopped to claim that the receiving* was not authorized by its charter.[1]

In Slater Woollen Co. *v.* Lamb, the contract sued on was not *ultra vires*. That fact being decisive of the case, the further suggestion in the opinion, "Besides, the defendant cannot refuse payment on this ground, but the legislature may enforce the prohibition by causing the charter to be revoked when they shall determine that it has been abused," was, as has been since pointed out, wholly *obiter dictum*. But the following words from that case are of value here: "There is a distinction between a corporation making *a contract in excess of its powers, and making a contract which it is prohibited by statute from making, or which is against public policy or sound morals; and there is also a distinction between suing for breach of an executory contract, and suing to recover the value of property which has been received and retained by the defendant under* a contract executed on the part of the plaintiff."

In Tracy *v.* Talmage, President, &c.,[2] the plaintiff sold stocks to the bank, and received in payment notes of a description which the law prohibited the bank from issuing. He was considered to be so far affected with a knowledge of the law that he could not recover on the illegal notes. But it was held that he was not *in pari delicto* with the bank in any such sense as to prevent him from holding the bank liable to reimburse to him the value of the stocks sold, either in *quantum meruit* or *assumpsit*. In another case,[3] a loan was made in form to the president, who gave his individual note for the amount, but with the indorsement of the bank. It was held that, if the loan was in fact for the benefit of the corpo-

[1] § 757. Cogswell *v.* Rockingham Ten Cents Savings Bank, 59 N. H. 43.

[2] Tracy *v.* Talmage, 4 Kern. 162.

[3] Central Bank *v.* Empire Stone Dressing Co., 26 Barb. 23.

ration, or if the lender was made to believe it to be so, and if it was within the scope of the business of the corporation, but this unusual process was resorted to solely to avoid a technical legal restriction which prevented the lender from lending directly to the corporation, then the corporation would be liable on the indorsement.[4] Otherwise only for the money received and retained by it.

The true distinction seems also to be recognized in Merchants' Bank *v.* State Bank, 10 Wall. 604. And see §§ 743, 747.

§ 758. **Ultra vires aside from the Matter in Litigation.** — When there is an *ultra vires* act entirely extrinsic to the transaction between the bank and D., and not the basis on which is built the validity of the said transaction, D. cannot avail himself of the fact. As if the bank has made *ultra vires* loans to others, or purchased real estate beyond its power, this can be no defence to D. in a suit for money the bank has loaned to him.

Expansion of § 726.

If the *ultra vires* act, though not a part of the immediate transaction with D., is the foundation upon which is built the validity of such transaction, D. can or cannot raise the objection according to the principles above. If the effect of the *ultra vires* act is to deprive D. of the rights he would otherwise have, as if the bank attempts to create a lien on stock by an unauthorized by-law, and D. purchases stock (at least if he has no notice of the by-law), it will not be sustained against him.

So if a corporation exercises the power of eminent domain, it must be fully and actually authorized. It is not enough for it to be a *de facto* corporation to sustain the exercise of any *privilege*, or power which infringes on common rights. On the other hand,[1] where the *ultra vires* act does not tend to infringe on D.'s just rights, where D. has voluntarily entered into a transaction knowing of the act, or where the transaction between the bank and D. involves only such relations as may exist among private individuals, perfect justice can usually, if not always, be done to D. without reference to the

[4] Central Bank *v.* Empire Stone Dressing Co., 26 Barb. 23.

[1] § 758. See Vermont case in § 728.

ultra vires, and he will not be allowed to escape a just liability by pleading it. In transactions, therefore, which do not involve privilege, it is enough if the bank is a *de facto* corporation, and its failure to fulfil any condition of its existence, precedent or subsequent, will not be relevant in a private suit.

Failure to perform conditions precedent or subsequent.

When a "charter has actually been granted to certain persons to act as a corporation, and they are actually in the possession and enjoyment of the corporate rights granted, such possession and enjoyment will be held valid against one who has dealt with them in their corporate character. Angell and Ames on Corporations, § 80. He cannot be permitted to prove, in a collateral proceeding, that a condition precedent to its full corporate existence has not been complied with. As against him, the charter and a use of rights claimed to have been conferred by it are sufficient. *When there is a de facto corporation, and the State does not interfere, its corporate existence and its ability to contract cannot be questioned in a suit brought upon an evidence of a debt given to it.* Commissioners *v.* Bolles, 4 Otto, 104. It is well settled that although a charter may be declared null and void by the proper authority, yet the violation thereof cannot be determined in a collateral suit. Irvine *v.* Lumbermen's Bank, 2 W. & S. 190."[1]

"All conditions precedent having been performed by the incorporators, it is simply out of all precedent for the appellant in a collateral proceeding like this, or in any other proceeding, to attempt to show that the corporation was a nullity, by showing that certain conditions subsequent had not been complied with. *The existence of a corporation once formed can only be called in question by a direct proceeding, and that, too, at the suit of the* sovereign power, the *State.* Nor are the breaches of conditions subsequent alleged by the appellant, such as a failure of the stockholders to pay up their subscription, the failure to hold elections to elect directors, and breaches of a similar character, sufficient grounds for the destruction of a corporate existence, even at the suit of the State, where a

[1] § 758. Spahr *v.* Farmers' Bank, 94 Pa. St. 434.

by-law, and of course where the law provides that the directors named in the charter shall serve until their successors are elected and qualified as provided by the laws of the State. Mansf. Dig., § 5420. Commonwealth ex rel. Claghorn *v.* Cullen, 13 Pa. St. 133. Cahill *v.* Kalamazoo Mutual Ins. Co., 2 Douglas, (Mich.) 124. . . . The contract of sale being otherwise fair and lawful, both parties having performed their respective parts, the plea of *ultra vires* cannot and ought not in equity and good conscience to avail anything. See Hitchcock *v.* Galveston, 96 U. S. 341, and Union National Bank *v.* Mathews, 98 U. S. 621." [2]

To exercise a privilege requires a corporation *de jure*.

"In order to sustain proceedings by which a body claims to be a corporation, and as such empowered to exercise the right of eminent domain, and under that right to take the property of a citizen, it is not sufficient that it be a corporation *de facto*. It must be a corporation *de jure*. Where the power is conferred upon a corporation duly formed, it will not be defeated simply because the corporation has done or omitted some act which may be a *cause* of forfeiture of its rights and franchises, for it rests with the State to determine whether such forfeiture will be enforced. *Judicial* proceedings are necessary to enforce such a forfeiture, and it may be waived. That was the point to which the opinion in the Matter of the Brooklyn, &c. Railroad Co., 72 N. Y. 245, cited by the appellant, was directed." [3]

Irregular organization.

No irregularity in the original organization (though a cause of forfeiture) will relieve stockholders from their liability to redeem the circulating notes.[4]

§ 759. **Forfeiture.** — In considering this matter several questions arise.

First. Of what nature are the acts which constitute a cause of forfeiture? Where is the dead line? (A, below.)

Second. When an officer oversteps this line, will the Government hurl its thunderbolt at the bank? How are we to

[2] Town of Learcy *v.* Yarnell, 47 Ark. 280.

[3] New York Cable Co. *v.* Mayor, &c. of New York, 104 N. Y. 43.

[4] McDougald *v.* Bellamy, 18 Ga. 411.

decide whether a given act is that of the bank or of the individual officer, as between the bank and the government? (B.)

Third. Does the occurrence of a cause of forfeiture itself produce the consequence, or must legal proceedings be instituted? (C.)

Fourth. When this malady attacks a bank, can it be cured? (D.)

§ 760. (A) **Causes of Forfeiture.** — It is a tacit condition of incorporation that the bank shall act up to the end or design of its creation, and for neglect or abuse of its franchises its charter may be declared forfeit.[1] The National Banking Law declares, that if the directors of a bank knowingly violate, or knowingly permit any of the officers, agents, or servants of the association to violate, any of the provisions of the law under the title National Banks, its franchises *shall be forfeited*,[2] on suit by the Comptroller. The Massachusetts law is, that if a "bank has exceeded its powers, or failed to comply with any of the rules, restrictions, and conditions provided by law, its corporate franchise *may* be declared forfeited."[3]

The rule of the common law we believe to be, that if a bank, through its stockholders or directors, acting as a body, *knowingly* exceeds the authority of the bank, or violates any provision of law, or knowingly permits any agent to do the same, its charter *may* be declared forfeited, in the discretion of the court,[4] when suit is brought by the State for the purpose. The word *knowingly* of course refers only to matters of fact in this connection, for the law they are bound to know, and a violation of it through ignorance, not of fact, but of law, is no excuse. The knowledge may be

Common rule law.

[1] § 760. People *v.* Washington Bank, 6 Cow. 211; People *v.* Bank of Niagara, id. 196; State Bank *v.* State, 1 Blackf. 279; Atchafalaya Bank *v.* Dawson, 13 La. 497; Hamtramck *v.* Bank, 2 Mo. 169; Commonwealth *v.* Commercial Bank of Pennsylvania, 28 Pa. St. 383.

[2] H. § 53, R. S. 5239.

[3] Pub. Sts. 687.

[4] Even if a sufficient cause to justify a forfeiture be shown to the court, still it is not imperative upon the court to decree forfeiture. Whether or not this shall be done is a question for the discretion of the court upon a consideration of all the circumstances. State of Vermont *v.* Essex Bank, 8 Vt. 489.

either actual or constructive. (See chapter on Directors.) A substantial performance of conditions, precedent or subsequent, is all that is required.[5]

Mistake alone, unless it renders the bank unable to go on with its business in safety to the community, would not at common law cause forfeiture. And any mere *internal violation* of law, which, though it infringes the rights of stockholders or officers, does not have a directly mischievous effect upon the public, (as, for example, a by-law imposing unauthorized liabilities on stockholders, or unlawful elections or amotions from office, or disfranchisement without cause, or accepting accommodation paper,) the courts will rather correct the wrong than declare a forfeiture which would punish still more the very ones whose rights have been violated, as well as the wrongdoers.

Mistake. Internal *ultra vires.*

(*a*) *Entire discontinuance* of all business except *settling up* its affairs is a cause of forfeiture;[6] and, in general, total non-user is a cause of forfeiture, though the bank is not dissolved till it is so declared in a judicial proceeding, and, if it resumes business before suit is brought for this purpose, it will be a good defence. It has been said, that mere omission to exercise corporate powers disconnected with any acts does not cause forfeiture,[7] and this is always true of an omission to exercise a severable part of the franchise, unless it involves neglect of a duty made compulsory by law; but a total discontinuance or abandonment of business would probably always be considered a cause of forfeiture, unless the bank has shown its power and intent to resume by again beginning to do business, as noted above.

Non-user.

§ 761. Generally, it may be said that any violation, wilfully or knowingly committed, of any material direction or provision embodied in the law of the corporate existence, or any fraudulent or dishonest act, or the occurrence of anything which shows that for any reason, whether of fault or mis-

[5] People *v.* Thompson, 21 Wend. 235; Commonwealth *v.* Alleghany County, 20 Pa. St. 185.

[6] Jackson Marine Ins. Co. Matter, 4 Sandf. Ch. 550.

[7] Attorney-General *v.* Bank of Niagara, 1 Hopkins, 36.

fortune, the bank is incompetent in any respect to perform safely and usefully any of its functions, will furnish sufficient ground for taking away the corporate franchise.[1] Specific cases which have arisen in various States may be given, by way of illustration, as follows: the making loans to the directors before the shareholders have passed by-laws concerning this matter;[2] refusal to transmit a statement of the condition of the bank, required by law to be made to a government official;[3] excessive loans to directors, though no by-law exists in reference thereto;[3] the making of a note to the bank, without consideration and merely colorable, which the bank receives and uses for the purpose of making its assets appear greater;[4] non-user or misuser of the franchise;[5] wilful taking of illegal interest.[6] Whether or not suspension of specie payments will work a forfeiture is a question which has in different States been differently decided.[7]

Illegal loans or failure to make statement.
Fraud.
Non-user.
Misuser.
Usury.
Suspension of specie payment.

Under the State laws of New York it was held, in 1826, that suspension of payment, even accompanied by insolvency, was not necessarily a cause of forfeiture, but that the same must be continuous. For how long a time it must continue, in the absence of a statutory limitation, was not declared, since in these cases it appeared that the banks had become solvent again, and resumed payment. Suspending payment was said to be sometimes a prudent and justifiable measure,

[1] § 761. See State Bank *v.* State, 1 Blackf. 270.

[2] Conant *v.* Seneca County Bank, 1 Ohio St. 298.

[3] State *v.* Same, 5 Ohio St. 171.

[4] Agricultural Bank *v.* Robinson, 24 Me. 274.

[5] People *v.* Hudson Bank, 6 Cow. 217; Same *v.* Niagara Bank, id. 196.

[6] Commonwealth *v.* Commercial Bank, 28 Pa. St. 383; Fleckner *v.* Bank of United States, 8 Wheat. 338.

[7] It will not in Ohio: State *v.* Commercial Bank, 10 Ohio, 535. It will in Virginia: Planters' Bank *v.* State, 6 Sm. & Mar. 628; 7 id. 163; Commercial Bank of Natchez *v.* State, 6 id. 599. It will in South Carolina: State *v.* Bank of Carolina, 1 Speers, 433. Apparently also in Georgia and Mississippi: Robinson *v.* Bank of Darien, 18 Ga. 65; Maury *v.* Ingraham, 28 Miss. 171.

consistent with the ultimate solvency of the bank; and that there must be a total non-user to be a ground of forfeiture.[8] So also in Virginia, it is a *quære*, in the cases cited in note 7, whether a merely temporary suspension would constitute a ground for forfeiture.

Failure to pay in capital.

Where a banking corporation under the statute fails within the period of one year from its organization to pay up its entire capital stock in cash, its charter is liable to forfeiture.[9]

Withdrawal of capital.

Where the organic law under which a bank is established requires a certain sum to be paid in, in cash, upon account of the capital stock, if this amount be paid in by the shareholders and then forthwith be in great part paid back again to them in the shape of loans made to them upon private security (*apparently*, in the cited case, upon security of their very shares in the bank), this constitutes such an obvious deviation from the intention of the statute as to justify proceedings for the forfeiture of the charter.[10]

A single wilful neglect or abuse.

Mistake or omission.

Though abuse, or wilful omission in a *single* instance, or any negligent act or omission in violation of an express requirement, is a cause of forfeiture, yet a *mistake*, or accidental negligence or omission, or discontinuance of a several part of the bank's franchises, or any nonfeasance not of a mischievous tendency, nor contrary to particular requisition of charter, works no forfeiture.[11]

Insolvency.

Insolvency and assignment of its property, so as to disable the bank from continuing its business, is a cause for forfeiture on a *quo warranto*.[12]

[8] People *v.* Bank of Niagara, 6 Cow. 196; Same *v.* Bank of Washington & Warren, id. 211.

[9] People ex rel. *v.* City Bank, 7 Col. 226.

[10] State of Vermont *v.* Essex Bank, 8 Vt. 489.

[11] Bank Commissioners *v.* Bank of Buffalo, 6 Paige, 497; Paschall *v.* Whitsell, 11 Ala. 472.

[12] State *v.* Commercial Bank, 43 Sm. & Mar. 569; People *v.* Hudson Bank, 6 Cowen, 217; Bank Commissioners *v.* Bank of Brest, Harr. Ch. (Mich.) 112.

Embezzling money deposited, going into debt beyond the prescribed limit,[13] issuing more bills than is lawful, or having an agency in another State to receive deposits in violation of the charter, is a cause of forfeiture.[14]

Embezzling. Borrowing. Wrongful issue or agency.

§ 762. (B) **The Line between Individual and Corporate Action in Relation to Forfeiture** is indicated in the National Banking Law, II. § 53. If the board of directors order, or *knowingly permit*, or ratify the act of an agent or officer, it is the act of the bank, and the burden of proof is on the prosecution to show that the act is a corporate, not an individual one. We will now notice these points somewhat more fully.

(*a*) An act or omission, in order to furnish ground for proceedings to take away the corporate franchise, must be the act of the corporation itself. Cases might arise in which the act or omission of the shareholders, as a body, could have this effect. *Ordinarily, however, the law regards the board of directors as constituting the body corporate for all matters of this description.* The fault must accordingly be theirs, either directly or by legal implication. Otherwise, it will not be the act of the bank, and will not be a cause of forfeiture. Thus, if a cashier or teller, although acting within the scope of his allotted functions, commits a breach of the organic law, this fact alone is not sufficient to cause a forfeiture. On the contrary, it will be presumed that he alone and individually, of his own motion, is guilty of the misdoing. But, if the contrary be affirmatively shown, and if it be actually proved that the directors ordered, or knowingly permitted or ratified, the illegal act, then it remains no longer the act of the individual officer, but becomes the act of the bank, and as such furnishes ground for the process for disfranchisement. It is only when the act of the subordinate is rendered by the attendant circumstances, in the view of the law, the act of the principal, — that is to say, of the board of directors, or of the bank itself, — that the prin-

The act must be that of the bank.

[13] Bank Commissioners *v.* Rhode Island Central Bank, 5 R. I. 12.

[14] People *v.* Oakland County Bank, 1 Doug. (Mich.) 291.

cipal will be deprived of its corporate existence by reason of it.[1]

(*b*) The burden of proof has been already touched upon. The suit is in the nature of a criminal prosecution, and the burden is on the government to rebut the presumptions of the bank's innocence. To be sure, either the officer or the bank is guilty, but it is less to be presumed that a large body is guilty of violating the law, than that one man has transgressed; especially as in this case it is clear the officer has gone wrong as soon as the act is proved, whether the bank is in fault or not, so that the presumption of innocence stands clear and strong in favor of the bank; and though the facts that the officer acted ostensibly for the bank, or in the course of his employment, or that the bank has received benefit from the act, are to be considered, the mere fact of the difficulty of proving that the bank is involved should not shift the burden. For this would be overturning the principles of the law, and requiring every one suspected of being a criminal or violator of the law to establish his innocence, provided the circumstances indicate that it will be easier for him to do that than for the government to prove his guilt, and would have the court saying to those indicted, "See here, things are not clear, but look very suspicious for you in this case, and we cannot very easily find out the facts; now prove your innocence." If a ratification is relied upon, the burden is on the prosecution to show that the bank (board of directors, or body of stockholders), with full knowledge of the facts, acquiesced in and adopted the acts of its agent. It is not enough to show that the bank with proper diligence might have known the facts.[2]

§ 763. (C) **The Effect of the Occurrence of an Act by a Bank of such Nature as to subject it to Proceedings aimed at Forfeiture of its Charter**, extends no further than this opening the door to direct suit by the Government;[1] such matter cannot be set up and tried in collateral proceedings. There must be direct

[1] § 762. Clark *v.* Metropolitan Bank, 3 Duer, 241; State *v.* Commercial Bank, 6 Sm. & Mar. 218.

[2] Murray *v.* Nelson Lumber Co., 143 Mass. 251.

[1] § 763. Dyer *v.* Walker, 40 Pa. St. 157; Silver Lake Bank *v.* North,

process, instituted by the Government, in which the defence, excuse, or explanation of the bank will be heard, and the distinctive question will be judicially passed upon, free from the complication of any other parties, issues, or interests.[2]

Until forfeiture is judicially declared, the bank's power of doing business is not affected; unless of course the organic law declares that subsequent acts shall be void, or construction gives that meaning to the law, as, perhaps, if the charter should declare that the estate or franchise should absolutely determine on happening of a cause of forfeiture. See § 764.

Power conferred on a corporation duly formed will not be defeated simply because the corporation has done or omitted some act which may be a cause of forfeiture of its rights and franchises; for it rests with the State to determine whether such forfeiture will be enforced;[3] and even in respect to parties to the very transaction that is unlawful, it is often the case that no effect is produced by the fact that the act was beyond the powers of the bank. No one can escape liability for money borrowed of the bank because the loan was in violation of law,[4] nor any other liability justly attaching. (See *ultra vires.*) Even where proceedings for forfeiture of franchise are pending, the bank may continue to do business until the forfeiture is declared.[4]

§ 764. (D) **Cure of Forfeiture.** — A cause of forfeiture may be waived by legislative action,[1] unless the charter declares the franchise shall determine absolutely on failure to perform its conditions,[2] and perhaps even then.[3]

4 Johns. 379; Banks *v.* Poitiaux, 3 Rand. 142; Planters' Bank *v.* Bank of Alexandria, 10 Gill & J. 346.

[2] Grand Gulf Bank *v.* Archer, 8 Sm. & Mar. 151; Receivers of Bank of Circleville *v.* Rennick, 15 Ohio, 322.

[3] New York Cable Co. *v.* Mayor, &c. of New York, 104 N. Y. 43.

[4] Stephens *v.* Monongahela National Bank, 88 Pa. St. 157; and see *Ultra vires*, § 722.

[1] § 764. Commercial Bank of Natchez *v.* State of Mississippi, 6 Sm. & Mar. 622.

[2] Quincy Canal *v.* Newcomb, 7 Met. 277; People *v.* Manhattan Co., 9 Wend. 351.

[3] People *v.* Oakland County Bank, 1 Doug. (Mich.) 282.

CHAPTER XLIII.

LEGISLATIVE CONTINUANCE OF CORPORATION.

§ 765. The corporation may be continued in existence by virtue of an act of legislature, equally whether the act is passed before or after the expiration of the charter limitation. The bank will be revived by the act passed after the expiration in every respect as the same corporation which it was before; and will be in no respect affected by the break in continuity, except as to contracts such as official bonds that are bounded by the life of the charter. This is the unquestionable effect of a simple act of continuance or revival. But whether the act is in fact one of continuance and revival of the old corporation, or is the creation and institution of a new one, is a question of great importance. No general rule can be laid down for determining it, inasmuch as it depends in each case upon the intent of the legislators, as the same is judicially gathered and construed from the terms of the enactment. The statute will always be conclusive. The acts and conduct of the directors, which can possibly amount to nothing more than the expression of their construction of the act, will not be allowed to alter the true legal meaning and effect thereof, as the same shall appear to the judges. The enactment has either continued an old corporation, or it has made a new one. Whichever act it has done, it has done that act absolutely and irrevocably, and beyond the possibility of modification or change by the words or deeds of the directors, who hold their office under and in subjection to it. But there is an important distinction between the two cases; for, if there is a continuance, the corporation succeeds to both the rights and the liabilities existent at the time of the taking effect of the act. But if there is a new corporation, it succeeds neither

to the rights nor to the liabilities of its predecessor, with which, and with the affairs, assets, and debts of which it has no more to do than if it were any other bank in the country. It makes no difference that the name is the same, that the place of business is the same, that the officers and shareholders, or the majority of them, are the same. The combination of these elements proves nothing conclusively ; for if the arbitrary statute has created a new corporation, new and therefore wholly independent it is and must be, however close and perfect may be the similarity between it and any predecessor. In such case, there is similarity only, and not identity. Indeed, the traits of similarity are not properly even competent evidence to prove identity. For whether or not there is identity is purely a question of statutory phraseology.[1]

[1] § 765. Lincoln & Kennebec Bank *v.* Richardson, 1 Greenl. 79; Foster *v.* Essex Bank, 17 Mass. 479; Bellows *v.* Hallowell & Augusta Bank, 2 Mason, 31; Wyman *v.* Same, 14 Mass. 58.

CHAPTER XLIV.

DISSOLUTION.

§ 766. A BANK may be dissolved by expiration of the charter, by judicial declaration of forfeiture, by legislative repeal of the charter, if power for that purpose is reserved, (but no rights or property acquired by a legitimate exercise of the franchises while they existed can be disturbed,[1]) and by voluntary dissolution or surrender of the charter. Under the National Banking Laws, a bank may be closed by vote of the members owning two thirds of the stock. II. § 42.

Under the Massachusetts banking laws, the franchise may be surrendered by a majority of all the votes that the whole body of stockholders could cast if all were present;[2] the votes that a stockholder may cast depending somewhat on the amount of his stock. But in Massachusetts a corporation is continued as a body corporate for three years after dissolution from any cause, for the purposes of settling its concerns, and bringing and defending suits, &c., arising in the course of such settlement.[3]

[1] § 766. Commonwealth *v.* Essex County, 13 Gray, 253.
[2] Pub. Sts. 688.
[3] Pub. Sts. 569.

PART II.

THE NATIONAL BANKING LAWS

AND THEIR CONSTRUCTION.

U. S. REVISED STATUTES, 1878, AND SUBSEQUENT ACTS.

WITH NOTES UPON THE CASES.

[As many cases refer to the sections of the law of 1864, and many others to those of the Revised Statutes, it has been thought best so to arrange the law that either manner of reference will easily lead to the appropriate text. Accordingly, the sections from 1 to 63 inclusive follow the numbering in the act of June 3, 1864, the numbers in parentheses representing the corresponding sections of the Revised Statutes in the edition of 1878. This necessitates changing the order of the Revised Statutes, but the following Synopsis will make it easy to refer to the section of this book which corresponds to a given section of the Revised Statutes.]

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§ 0. SYNOPSIS OF THE NATIONAL BANKING LAWS.

COMPTROLLER OF THE CURRENCY.

R. S. (324.) Bureau of. § 1.
" (325.) Appointment. § 1.
" (326.) Bond and oath. § 1.
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COMPTROLLER OF THE CURRENCY.[1]

§ 1. (*a*) (324.) **Bureau of Comptroller established.** — There shall be in the Department of the Treasury a Bureau charged with the execution of all laws passed by Congress relating to the issue and regulation of a national currency secured by United States bonds; the chief officer of which Bureau shall be called the Comptroller of the Currency, and shall perform his duties under the general direction of the Secretary of the Treasury.

(*b*) (325.) **Appointment and Term.** — The Comptroller of the Currency shall be appointed by the President, on the recommendation of the Secretary of the Treasury, by and with the advice and consent of the Senate, and shall hold his office for the term of five years, unless sooner removed by the

[1] See § 101.

President, upon reasons to be communicated by him to the Senate; and he shall be entitled to a salary of five thousand dollars a year.

(*c*) (326.) **Oath and Bond.** — The Comptroller of the Currency shall, within fifteen days from the time of notice of his appointment, take and subscribe the oath of office; and he shall give to the United States a bond in the penalty of one hundred thousand dollars, with not less than two responsible sureties, to be approved by the Secretary of the Treasury, conditioned for the faithful discharge of the duties of his office.

(*d*) (327.) **Deputy Comptroller.** — There shall be in the Bureau of the Comptroller of the Currency, a Deputy Comptroller of the Currency, to be appointed by the Secretary, who shall be entitled to a salary of two thousand five hundred dollars a year, and who shall possess the power and perform the duties attached by law to the office of Comptroller during a vacancy in the office or during the absence or inability of the Comptroller. The Deputy Comptroller shall also take the oath of office prescribed by the Constitution and laws of the United States, and shall give a like bond in the penalty of fifty thousand dollars.

(*e*) (328.) **Clerks.** — The Comptroller of the Currency shall employ, from time to time, the necessary clerks, to be appointed and classified by the Secretary of the Treasury, to discharge such duties as the Comptroller shall direct. See R. S. § 169.

(*f*) (329.) **Neither Comptroller nor Deputy shall be interested in a National Bank.** — It shall not be lawful for the Comptroller or the Deputy Comptroller of the Currency, either directly or indirectly, to be interested in any association issuing national currency under the laws of the United States.

§ 2. (330.) **Seal.** — The seal devised by the Comptroller of the Currency for his office, and approved by the Secretary of the Treasury, shall continue to be the seal of office of the Comptroller, and may be renewed when necessary. [A description of the seal, with an impression thereof, and a certificate of approval by the Secretary of the Treasury, shall be filed in the office of the Secretary of State.]

(884.) **His Documents. — Evidence.**[1] — Every certificate, assignment, and conveyance executed by the Comptroller of the Currency, in pursuance of law, and sealed with his seal of office, shall be received in evidence in all places and courts; and all copies of papers in his office, certified by him and authenticated by the said seal, shall in all cases be evidence equally with the originals. An impression of such seal directly on the paper shall be as valid as if made on wax or wafer.

§ 3. (*a*) (331.) **Rooms, Furniture, &c.** — There shall be assigned, from time to time, to the Comptroller of the Currency, by the Secretary of the Treasury, suitable rooms in the Treasury building for conducting the business of the Currency Bureau, containing safe and secure fire-proof vaults, in which the Comptroller shall deposit and safely keep all the plates not necessarily in the possession of engravers or printers, and other valuable things belonging to his Department; and the Comptroller shall from time to time furnish the necessary furniture, stationery, fuel, lights, and other proper conveniences for the transaction of the business of his office.

(*b*) (332.) **Comptroller to Examine Banks in District of Columbia.** — The Comptroller of the Currency, in addition to the powers conferred upon him by law for the examination of national banks, is further authorized, whenever he may deem it useful, to cause examination to be made into the condition of any bank in the District of Columbia organized under act of Congress. The Comptroller, at his discretion, may report to Congress the results of such examination. The expense necessarily incurred in any such examination shall be paid out of any appropriation made by Congress for special bank examinations.

(*c*) (333.) **Comptroller's Annual Report.** — The Comptroller of the Currency shall make an annual report to Congress, [at the commencement of its session,] exhibiting, —

First. A summary of the state and condition of every association from which reports have been received the preceding year, at the several dates to which such reports refer, with an

[1] §§ 101, 102, 106 *a*.

abstract of the whole amount of banking capital returned by them, of the whole amount of their debts and liabilities, the amount of circulating notes outstanding, and the total amount of means and resources, specifying the amount of lawful money held by them at the times of their several returns, and such other information in relation to such associations as, in his judgment, may be useful.

Second. A statement of the associations whose business has been closed during the year, with the amount of their circulation redeemed and the amount outstanding.

Third. Any amendment to the laws relative to banking by which the system may be improved, and the security of the holders of its notes and other creditors may be increased.

Fourth. A statement exhibiting under appropriate heads the resources and liabilities and condition of the banks, banking companies, and savings banks organized under the laws of the several States and Territories; such information to be obtained by the Comptroller from the reports made by such banks, banking companies, and savings banks to the legislatures or officers of the different States and Territories, and, where such reports cannot be obtained, the deficiency to be supplied from such other authentic sources as may be available.

Fifth. The names and compensation of the clerks employed by him, and the whole amount of the expenses of the banking department during the year.

(3811.) — When the annual report of the [*Secretary of the Treasury*] [Comptroller of the Currency] upon the national banks [and banks under State and Territorial laws] is completed, or while it is in process of completion, if thereby the business may be sooner despatched, the work of printing shall be commenced, under the superintendence of the Secretary, and the whole shall be printed and ready for delivery on or before the first day of December next after the close of the year to which the report relates.

§ 4. (5158.) **United States Bonds defined.** — The term "United States bonds," as used throughout this chapter, shall be construed to mean registered bonds of the United States.

ORGANIZATION AND POWERS.

§ 5. (5133.) **Formation of National Banks.**[1] — Associations for carrying on the business of banking under this Title may be formed by any number of natural persons, not less in any case than five. They shall enter into articles of association, which shall specify in general terms the object for which the association is formed, and may contain any other provisions, not inconsistent with law, which the association may see fit to adopt for the regulation of its business and the conduct of its affairs. These articles shall be signed by the persons uniting to form the association, and a copy of them shall be forwarded to the Comptroller of the Currency, to be filed and preserved in his office. (See Rev. Sts. § 324.)

The act of June 20, 1874, chap. 343, declares "that the act entitled 'An Act to provide a national currency secured by a pledge of United States bonds, and to provide for the circulation and redemption thereof,' approved June third, eighteen hundred and sixty-four, shall hereafter be known as 'the National Bank Act.'"

§ 6. (*a*) (5134.) **Certificate of Organization.**[2] — The persons uniting to form such an association shall, under their hands, make an organization certificate, which shall specifically state : —

(1) **Name.**[3] — First. The name assumed by such association, which name shall be subject to the approval of the Comptroller of the Currency.

(2) **Place.**[4] — Second. The place where its operations of discount and deposit are to be carried on, designating the State, Territory, or district, and the particular county and city, town, or village.

(3) **Capital.**[5] — Third. The amount of capital stock and the number of shares into which the same is to be divided.

(4) **Shareholders.** — Fourth. The names and places of residence of the shareholders, and the number of shares held by each of them.

[1] 20 June, 1874. See § 84 *a*.
[2] See §§ 101, 106.
[3] See § 81.
[4] See § 81.
[5] § 7; and see §§ 13–15, 81.

(5) **Object of the Certificate.** — Fifth. The fact that the certificate is made to enable such persons to avail themselves of the advantages of this Title.

(*b*) (5135.) **Acknowledgment and Filing of Certificate.** — The organization certificate shall be acknowledged before a judge of some court of record, or notary public; and shall be, together with the acknowledgment thereof, authenticated by the seal of such court, or notary, transmitted to the Comptroller of the Currency, who shall record and carefully preserve the same in his office. See Rev. Sts. § 885.

§ 7. (5138.) **Capital.**[1] — No association shall be organized under this Title with a less capital than one hundred thousand dollars; except that banks with a capital of not less than fifty thousand dollars may, with the approval of the Secretary of the Treasury, be organized in any place the population of which does not exceed six thousand inhabitants. No association shall be organized in a city the population of which exceeds fifty thousand persons with a less capital than two hundred thousand dollars.

§ 8. (5136.) **Powers of Bank and Directors, and when and where the Bank may do Business.**[2] — Upon duly making and filing articles of association and an organization certificate, the association shall become, as from the date of the execution of its organization certificate, a body corporate, and as such, and in the name designated in the organization certificate, it shall have power, —

First. To adopt and use a corporate seal.

Second. To have succession for the period of twenty years from its organization, unless it is sooner dissolved according to the provisions of its articles of association, or by the act of its shareholders owning two thirds of its stock, or unless its franchise becomes forfeited by some violation of law.

Third. To make contracts.

Fourth. To sue and be sued, complain and defend, in any court of law and equity, as fully as natural persons.

[1] See §§ 12, 13, 14, 15, 81.

[2] See § 108. 2 Abb. U. S. 416; Casey *v.* Galli, 94 U. S. 673; Main *v.* Second National Bank, Chicago, 6 Biss. 26.

Fifth. To elect or appoint directors, and by its board of directors to appoint a president, vice-president, cashier, and other officers, define their duties, require bonds of them, and fix the penalty thereof, dismiss such officers or any of them at pleasure, and appoint others to fill their places.

Sixth. To prescribe, by its board of directors, by-laws not inconsistent with law, regulating the manner in which its stock shall be transferred, its directors elected or appointed, its officers appointed, its property transferred, its general business conducted, and the privileges granted to it by law exercised and enjoyed.

Seventh. To exercise by its board of directors, or duly authorized officers or agents, subject to law, all such incidental powers as shall be necessary to carry on the business of banking; by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt; by receiving deposits; by buying and selling exchange, coin, and bullion; by loaning money on personal security; and by obtaining, issuing, and circulating notes according to the provisions of this title.

But no association shall transact any business except such as is incidental, and necessarily preliminary to its organization, until it has been authorized by the Comptroller of the Currency to commence the business of banking.

(5190.) — The usual business of each national banking association shall be transacted at an office or banking-house located in the place specified in its organization certificate.[1]

DIRECTORS AND PRESIDENT.[2]

§§ 9 & 10. (*a*) (5145.) **Election of Directors.** — The affairs of each association shall be managed by not less than five directors, who shall be elected by the shareholders at a meeting to be held at any time before the association is authorized by the Comptroller of the Currency to commence the business of banking; and afterward at meetings to be held on such

[1] Merchants' Bank *v.* State Bank, 10 Wall. 604.

[2] See § 109.

day in January of each year as is specified therefor in the articles of association. The directors shall hold office for one year, and until their successors are elected and have qualified.

(*b*) (5146.) **Qualifications of.** — Every director must, during his whole term of service, be a citizen of the United States, and at least three fourths of the directors must have resided in the State, Territory, or District in which the association is located, for at least one year immediately preceding their election, and must be residents therein during their continuance in office. Every director must own, in his own right, at least ten shares of the capital stock of the association of which he is a director. Any director who ceases to be the owner of ten shares of the stock, or who becomes in any other manner disqualified, shall thereby vacate his place.

(*c*) (5147.) **Oath required from.** — Each director, when appointed or elected, shall take an oath that he will, so far as the duty devolves on him, diligently and honestly administer the affairs of such association, and will not knowingly violate, or willingly permit to be violated, any of the provisions of this Title, and that he is the owner in good faith, and in his own right, of the number of shares of stock required by this Title, subscribed by him, or standing in his name on the books of the association, and that the same is not hypothecated, or in any way pledged, as security for any loan or debt. Such oath, subscribed by the director making it, and certified by the officer before whom it is taken, shall be immediately transmitted to the Comptroller of the Currency, and shall be filed and preserved in his office.

(*d*) (5148.) **Filling Vacancies.** — Any vacancy in the board shall be filled by appointment by the remaining directors, and any director so appointed shall hold his place until the next election.

(*e*) (5149.) **Failure to Elect on Proper Day.** — If, from any cause, an election of directors is not made at the time appointed, the association shall not for that cause be dissolved, but an election may be held on any subsequent day, thirty days' notice thereof in all cases having been given in a

newspaper published in the city, town, or county in which the association is located; and if no newspaper is published in such city, town, or county, such notice shall be published in a newspaper published nearest thereto. If the articles of association do not fix the day on which the election shall be held, or if no election is held on the day fixed, the day for the election shall be designated by the board of directors in their by-laws, or otherwise; or if the directors fail to fix the day, shareholders representing two thirds of the shares may do so.

(*f*) (5150.) **Election of President.** — One of the directors, to be chosen by the board, shall be the president of the board.

§ 11. (5144.) **Shareholders' Right to Vote.** — In all elections of directors, and in deciding all questions at meetings of shareholders, each shareholder shall be entitled to one vote on each share of stock held by him. Shareholders may vote by proxies duly authorized in writing; but no officer, clerk, teller, or book-keeper of such association shall act as proxy; and no shareholder whose liability is past due and unpaid shall be allowed to vote.

§ 12. (*a*) (5139.) **Shares and their Transfer.**[1] — The capital stock of each association shall be divided into shares of one hundred dollars each, and be deemed personal property, and transferable on the books of the association in such manner as may be prescribed in the by-laws or articles of association. Every person becoming a shareholder by such transfer shall, in proportion to his shares, succeed to all the rights and liabilities of the prior holder of such shares; and no change shall be made in the articles of association by which the rights, remedies, or security of the existing creditors of the association shall be impaired.

(*b*) (5151.) **Liability of Shareholders.**[2] — The shareholders of every national banking association shall be held individually responsible, equally and ratably, and not one for another, for all contracts, debts, and engagements of such association, to

[1] Van Allen *v.* The Assessors, 3 Wall. 573. See Lien on Shares, §§ 112, 112 *a*.

[2] §§ 112 *b* and 106 *a*.

the extent of the amount of their stock therein, at the par value thereof, in addition to the amount invested in such shares; except that shareholders of any banking association now existing under State laws, having not less than five millions of dollars of capital actually paid in, and a surplus of twenty per centum on hand, both to be determined by the Comptroller of the Currency, shall be liable only to the amount invested in their shares; and such surplus of twenty per centum shall be kept undiminished, and be in addition to the surplus provided for in this Title; and if at any time there is a deficiency in such surplus of twenty per centum, such association shall not pay any dividends to its shareholders until the deficiency is made good; and in case of such deficiency, the Comptroller of the Currency may compel the association to close its business and wind up its affairs under the provisions of chapter four of this Title.

(*c*) (5169.) **Comptroller's Certificate authorizing the Bank to commence Business.** — If, upon a careful examination of the facts so reported, and of any other facts which may come to the knowledge of the Comptroller, whether by means of a special commission appointed by him for the purpose of inquiring into the condition of such association, or otherwise, it appears that such association is lawfully entitled to commence the business of banking, the Comptroller shall give to such association a certificate, under his hand and official seal, that such association has complied with all the provisions required to be complied with before commencing the business of banking, and that such association is authorized to commence such business. But the Comptroller may withhold from an association his certificate authorizing the commencement of business, whenever he has reason to suppose that the shareholders have formed the same for any other than the legitimate objects contemplated by this Title.

(*d*) (5170.) **Publication of this Certificate.** — The association shall cause the certificate issued under the preceding section to be published in some newspaper printed in the city or county where the association is located, for at least sixty days next after the issuing thereof; or, if no newspaper is

published in such city or county, then in the newspaper published nearest thereto.

§ 13. (*a*) (5142.) **Increase of Capital.**[1] — Any association formed under this Title may, by its articles of association, provide for an increase of its capital from time to time, as may be deemed expedient, subject to the limitations of this Title. But the maximum of such increase to be provided in the articles of association shall be determined by the Comptroller of the Currency; and no increase of capital shall be valid until the whole amount of such increase is paid in, and notice thereof has been transmitted to the Comptroller of the Currency, and his certificate obtained specifying the amount of such increase of capital stock, with his approval thereof, and that it has been duly paid in as part of the capital of such association.

(*b*) (5143.) **Reduction of Capital.**[2] — Any association formed under this Title may, by the vote of shareholders owning two thirds of its capital stock, reduce its capital to any sum not below the amount required by this Title to authorize the formation of associations; but no such reduction shall be allowable which will reduce the capital of the association below the amount required for its outstanding circulation, nor shall any such reduction be made until the amount of the proposed reduction has been reported to the Comptroller of the Currency and his approval thereof obtained.

§ 14. (5140.) **Capital Stock. — How Paid and Proved.** — At least fifty per centum of the capital stock of every association shall be paid in before it shall be authorized to commence business; and the remainder of the capital stock of such association shall be paid in instalments of at least ten per centum each, on the whole amount of the capital, as frequently as one instalment at the end of each succeeding month from the time it shall be authorized by the Comptroller of the Currency to commence business; and the payment of each instalment shall be certified to the Comptroller, under oath, by the president or cashier of the association.

[1] § 113 *a*, *b*, *c*. See § 81.

[2] § 113 *d*.

§ 15. (5141.) **Delinquent Shareholder.** — Whenever any shareholder, or his assignee, fails to pay any instalment on the stock when the same is required by the preceding section to be paid, the directors of such association may sell the stock of such delinquent shareholder at public auction, having given three weeks' previous notice thereof in a newspaper published and of general circulation in the city or county where the association is located, or if no newspaper is published in said city or county, then in a newspaper published nearest thereto, to any person who will pay the highest price therefor, to be not less than the amount then due thereon, with the expenses of advertisement and sale; and the excess, if any, shall be paid to the delinquent shareholder. If no bidder can be found who will pay for such stock the amount due thereon to the association, and the cost of advertisement and sale, the amount previously paid shall be forfeited to the association, and such stock shall be sold as the directors may order, within six months from the time of such forfeiture, and if not sold it shall be cancelled and deducted from the capital stock of the association. If any such cancellation and reduction shall reduce the capital of the association below the minimum of capital required by law, the capital stock shall, within thirty days from the date of such cancellation, be increased to the required amount; in default of which a receiver may be appointed, according to the provisions of section fifty-two hundred and thirty-four, to close up the business of the association.

§ 16. (*a*) (5159.) **Bonds to be deposited as Security for Circulation.**[1] — Every association, after having complied with the provisions of this Title, preliminary to the commencement of the banking business, and before it shall be authorized to commence banking business under this Title, shall transfer and deliver to the Treasurer of the United States any United States registered bonds, bearing interest, to an amount not less than thirty thousand dollars and not less than one third of the capital stock paid in. Such bonds shall be received by the Treasurer upon deposit, and shall be by him safely kept

[1] 20 June, 1874. See § 84 (*a*), and § 76.

in his office, until they shall be otherwise disposed of, in pursuance of the provisions of this Title.

(*b*) (5160.) **Increase or Reduction of this Deposit.**[1] — The deposit of bonds made by each association shall be increased as its capital may be paid up or increased, so that every association shall at all times have on deposit with the Treasurer registered United States bonds to the amount of at least one third of its capital stock actually paid in. And any association that may desire to reduce its capital or to close up its business and dissolve its organization, may take up its bonds upon returning to the Comptroller its circulating notes in the proportion hereinafter required, or may take up any excess of bonds beyond one third of its capital stock, and upon which no circulating notes have been delivered.

(*c*) (5161.) **Exchange of Bonds.** — To facilitate a compliance with the two preceding sections, the Secretary of the Treasury is authorized to receive from any association, and cancel, any United States coupon bonds, and to issue in lieu thereof registered bonds of like amount, bearing a like rate of interest, and having the same time to run.

§ 17. (5168.) **Comptroller's Examination before authorizing Bank to begin Business.** — Whenever a certificate is transmitted to the Comptroller of the Currency, as provided in this Title, and the association transmitting the same notifies the Comptroller that at least fifty per centum of its capital stock has been duly paid in, and that such association has complied with all the provisions of this Title required to be complied with before an association shall be authorized to commence the business of banking, the Comptroller shall examine into the condition of such association, ascertain especially the amount of money paid in on account of its capital, the name and place of residence of each of its directors, and the amount of the capital stock of which each is the owner in good faith, and generally whether such association has complied with all the provisions of this Title required to entitle it to engage in the business of banking; and shall cause to be made and attested by the oaths of a majority of the directors, and by the

[1] See § 76.

president or cashier of the association, a statement of all the facts necessary to enable the Comptroller to determine whether the association is lawfully entitled to commence the business of banking.

§ 18. (5169.) See § 12 *c*.

(5170). See § 12 *d*.

§ 19. (*a*) (5162.) **Transfers of Bonds, how made.** — All transfers of United States bonds, made by any association under the provisions of this Title, shall be made to the Treasurer of the United States in trust for the association, with a memorandum written or printed on each bond, and signed by the cashier, or some other officer of the association making the deposit. A receipt shall be given to the association, by the Comptroller of the Currency, or by a clerk appointed by him for that purpose, stating that the bond is held in trust for the association on whose behalf the transfer is made, and as security for the redemption and payment of any circulating notes that have been or may be delivered to such association. No assignment or transfer of any such bond by the Treasurer shall be deemed valid unless countersigned by the Comptroller of the Currency.

(*b*) (5163.) **Registry of Transfers.** — The Comptroller of the Currency shall keep in his office a book in which he shall cause to be entered, immediately upon countersigning it, every transfer or assignment by the Treasurer, of any bonds belonging to a national banking association, presented for his signature. He shall state in such entry the name of the association from whose accounts the transfer is made, the name of the party to whom it is made, and the par value of the bonds transferred.

(*c*) (5164.) **Notice of Transfer to the Bank.** — The Comptroller of the Currency shall, immediately upon countersigning and entering any transfer or assignment by the Treasurer of any bonds belonging to a national banking association, advise by mail the association from whose accounts the transfer is made of the kind and numerical designation of the bonds, and the amount thereof so transferred.

§ 20. See (5163), §§ 19 and 25.

§ 20. (5165.) **Examination of Registry and Bonds.**[1] — The Comptroller of the Currency shall have at all times, during office hours, access to the books of the Treasurer of the United States for the purpose of ascertaining the correctness of any transfer or assignment of the bonds deposited by an association, presented to the Comptroller to countersign; and the Treasurer shall have the like access to the book mentioned in section fifty-one hundred and sixty-three, during office hours, to ascertain the correctness of the entries in the same; and the Comptroller shall also at all times have access to the bonds on deposit with the Treasurer, to ascertain their amount and condition.

§ 21. (5171.) **Circulating Notes, Delivery of.**[2] — Upon a deposit of bonds as prescribed by sections fifty-one hundred and fifty-nine and fifty-one hundred and sixty, the association making the same shall be entitled to receive from the Comptroller of the Currency circulating notes of different denominations, in blank, registered and countersigned as hereinafter provided, equal in amount to ninety per centum of the current market value of the United States bonds so transferred and delivered, but not exceeding ninety per centum of the amount of the bonds at the par value thereof, if bearing interest at a rate not less than five per centum per annum: *Provided*, That the amount of circulating notes to be furnished to each association shall be in proportion to its paid-up capital, as follows, and no more: —

First. To each association whose capital does not exceed five hundred thousand dollars, ninety per centum of such capital.

Second. To each association whose capital exceeds five hundred thousand dollars, but does not exceed one million of dollars, eighty per centum of such capital.

Third. To each association whose capital exceeds one million of dollars, but does not exceed three million of dollars, seventy-five per centum of such capital.

Fourth. To each association whose capital exceeds three millions of dollars, sixty per centum of such capital.

[1] See (5163), §§ 19 and 25.

[2] Repealed. See § 76.

§ 22. (*a*) (5172.) **Circulating Notes. Denomination. Form. Printing.**[1] — In order to furnish suitable notes for circulation, the Comptroller of the Currency shall, under the direction of the Secretary of the Treasury, cause plates and dies to be engraved, in the best manner to guard against counterfeiting and fraudulent alterations, and shall have printed therefrom, and numbered, such quantity of circulating notes, in blank, of the denominations of one dollar, two dollars, three dollars, five dollars, ten dollars, twenty dollars, fifty dollars, one hundred dollars, five hundred dollars, and one thousand dollars, as may be required to supply the associations entitled to receive the same. Such notes shall express upon their face that they are secured by United States bonds, deposited with the Treasurer of the United States, by the written or engraved signatures of the Treasurer and Register, and by the imprint of the seal of the Treasury; and shall also express upon their face the promise of the association receiving the same to pay on demand, attested by the signatures of the president or vice-president and cashier; and shall bear such devices and such other statements, and shall be in such form, as the Secretary of the Treasury shall, by regulation, direct.

(*b*) (5175.) **Limit of Issue of Notes under Five Dollars.** — Not more than one sixth part of the notes furnished to any association shall be of a less denomination than five dollars. After specie payments are resumed no association shall be furnished with notes of a less denomination than five dollars.

(*c*) (5176.) **Limit of Circulation of certain Banks.**[2] — No banking association organized subsequent to the twelfth day of July, eighteen hundred and seventy, shall have a circulation in excess of five hundred thousand dollars.

(*d*) (5177.) **Limit to Aggregate Circulation.**[3] — [*The aggregate amount of circulating notes issued under the act of February twenty-five, eighteen hundred and sixty-three, and under*

[1] 20 June, 1874. See § 84 *a*, and Rev. Sts. §§ 5115 and 5134.

[2] Repealed. See § 76.

[3] The limitation upon the circulation of national bank notes was removed by the statute of January 14, 1875. See § 84 *b*.

the act of June three, eighteen hundred and sixty-four, and under section one of the act of July twelve, eighteen hundred and seventy, and under this Title, shall not exceed three hundred and fifty-four millions of dollars.]

(*e*) (5178.) **Appointment of the Circulation.**[1] One hundred and fifty millions of dollars of the entire amount of circulating notes authorized to be issued shall be apportioned to associations in the States, in the Territories, and in the District of Columbia, according to representative population. One hundred and fifty millions shall be apportioned by the Secretary of the Treasury among associations formed in the several States, in the Territories, and in the District of Columbia, having due regard to the existing banking capital, resources, and business of such States, Territories, and District. The remaining fifty-four millions shall be apportioned among associations in States and Territories having, under the apportionments above prescribed, less than their full proportion of the aggregate amount of notes authorized, which made due application for circulating notes prior to the twelfth day of July, eighteen hundred and seventy-one. Any remainder of such fifty-four millions shall be issued to banking associations applying for circulating notes in other States or Territories having less than their proportion.

(5179.)[1] — In order to secure a more equitable distribution of the national banking currency, there may be issued circulating notes to banking associations organized in States and Territories having less than their proportion, and the amount of circulation herein authorized shall, under the direction of the Secretary of the Treasury, as it may be required for this purpose, be withdrawn, as herein provided, from banking associations organized in States having more than their proportion, but the amount so withdrawn shall not exceed twenty-five million dollars: *Provided*, That no circulation shall be withdrawn under the provisions of this section until after the fifty-four millions granted in the first section of the act of July twelfth, eighteen hundred and seventy, shall have been taken up.

[1] 20 June, 1874. See § 84 *a*.

(5180.) — The Comptroller of the Currency shall, under the direction of the Secretary of the Treasury, make a statement showing the amount of circulation in each State and Territory, and the amount necessary to be withdrawn from each association, and shall forthwith make a requisition for such amount upon such associations, commencing with those having a circulation exceeding one million of dollars, in States having an excess of circulation, and withdrawing their circulation in excess of one million of dollars, and then proceeding proportionately with other associations having a circulation exceeding three hundred thousand dollars, in States having the largest excess of circulation, and reducing the circulation of such associations in States having the greatest proportion in excess, leaving undisturbed the associations in States having a smaller proportion, until those in greater excess have been reduced to the same grade, and continuing thus to make such reductions until the full amount of twenty-five millions has been withdrawn; and the circulation so withdrawn shall be distributed among the States and Territories having less than their proportion, so as to equalize the same. Upon failure of any association to return the amount of circulating notes so required, within one year, the Comptroller shall sell at public auction, having given twenty days' notice thereof in one daily newspaper printed in Washington and one in New York City, an amount of the bonds deposited by that association as security for its circulation, equal to the circulation required to be withdrawn from the association and not returned in compliance with such requisition; and he shall, with the proceeds, redeem so many of the notes of such association, as they come into the Treasury, as will equal the amount required and not returned; and shall pay the balance, if any, to the association.

(*f*) (5181.) **Removal of Bank to another State to aid Apportionment of Circulation.**—Any association located in any State having more than its proportion of circulation may be removed to any State having less than its proportion of circulation, under such rules and regulations as the Comptroller of the Currency, with the approval of the Secretary of the

Treasury, shall prescribe: *Provided*, That the amount of the issue of said banks shall not be deducted from the issue of fifty-four millions mentioned in section five thousand one hundred and seventy-eight.

§ 23. (*a*) (5182.) **Bank Notes, for what Demands received.** — After any association receiving circulating notes under this Title has caused its promise to pay such notes on demand to be signed by the president or vice-president and cashier thereof, in such manner as to make them obligatory promissory notes, payable on demand, at its place of business, such association may issue and circulate the same as money. And the same shall be received at par in all parts of the United States in payment of taxes, excises, public lands, and all other dues to the United States, except duties on imports; and also for all salaries and other debts and demands owing by the United States to individuals, corporations, and associations within the United States, except interest on the public debt, and in redemption of the national currency.

(*b*) (5183.) **Issue of other Notes prohibited.**[1] — No national banking association shall issue [post notes or] any other notes to circulate as money than such as are authorized by the provisions of this Title.

§ 24. (*a*) (5184.) **Mutilated and Worn Notes.** — It shall be the duty of the Comptroller of the Currency to receive worn-out or mutilated circulating notes issued by any banking association, and also, on due proof of the destruction of any such circulating notes, to deliver in place thereof to the association other blank circulating notes to an equal amount. Such worn-out or mutilated notes, after a memorandum has been entered in the proper books, in accordance with such regulations as may be established by the Comptroller, as well as all circulating notes which shall have been paid or surrendered to be cancelled, shall be burned to ashes in presence of four persons, one to be appointed by the Secretary of the Treasury, one by the Comptroller of the Currency, one by the Treasurer of the United States, and one by the association, under such regulations as the Secretary of the Treasury may prescribe. A certifi-

[1] 18 February, 1875. See § 84 *e*.

cate of such burning, signed by the parties so appointed, shall be made in the books of the Comptroller, and a duplicate thereof forwarded to the association whose notes are thus cancelled.

(*b*) (5185.) **Gold Notes. — Authority to Issue.** — Associations may be organized in the manner prescribed by this Title for the purpose of issuing notes payable in gold; and upon the deposit of any United States bonds bearing interest payable in gold with the Treasurer of the United States, in the manner prescribed for other associations, it shall be lawful for the Comptroller of the Currency to issue to the association making the deposit circulating notes of different denominations, but none of them of less than five dollars, and not exceeding in amount eighty per centum of the par value of the bonds deposited, which shall express the promise of the association to pay them, upon presentation at the office at which they are issued, in gold coin of the United States, and shall be so redeemable. But no such association shall have a circulation of more than one million of dollars.[1]

(*c*) (5186.) **Reserve Fund of Gold Note Banks, and Duty to receive Notes of other Associations.**[2] — Every association organized under the preceding section shall at all times keep on hand not less than twenty-five per centum of its outstanding circulation, in gold or silver coin of the United States; and shall receive at par in the payment of debts the gold notes of every other such association which at the time of such payment is redeeming its circulating notes in gold coin of the United States, and shall be subject to all the provisions of this Title: *Provided*, That, in applying the same to associations organized for issuing gold notes, the terms "lawful money" and "lawful money of the United States" shall be construed to mean gold or silver coin of the United States; and the circulation of such associations shall not be within the limitation of circulation mentioned in this Title.

[1] Statute of 19 January, 1875, c. 19, removed the limitation imposed by the last sentence of this section upon associations authorized to issue circulating notes payable in gold coin. See §§ 65 and 84 *c*.

[2] See § 78.

§ 25. (5166.) **Annual Examination of Bonds by Associations.** — Every association having bonds deposited in the office of the Treasurer of the United States shall, once or oftener in each fiscal year, examine and compare the bonds pledged by the association with the books of the Comptroller of the Currency and with the accounts of the association, and, if they are found correct, to execute to the Treasurer a certificate setting forth the different kinds and the amounts thereof, and that the same are in the possession and custody of the Treasurer at the date of the certificate. Such examination shall be made at such time or times, during the ordinary business hours, as the Treasurer and the Comptroller, respectively, may select, and may be made by an officer or agent of such association, duly appointed in writing for that purpose; and his certificate before mentioned shall be of like force and validity as if executed by the president or cashier. A duplicate of such certificate, signed by the Treasurer, shall be retained by the association.

§ 26. (5167.) **Interest on the Bonds, and Custody of them.** — The bonds transferred to and deposited with the Treasurer of the United States, by any association, for the security of its circulating notes, shall be held exclusively for that purpose, until such notes are redeemed, except as provided in this Title. The Comptroller of the Currency shall give to any such association powers of attorney to receive and appropriate to its own use the interest on the bonds which it has so transferred to the Treasurer; but such powers shall become inoperative whenever such association fails to redeem its circulating notes. Whenever the market or cash value of any bonds thus deposited with the Treasurer is reduced below the amount of the circulation issued for the same, the Comptroller may demand and receive the amount of such depreciation in other United States bonds at cash value, or in money, from the association, to be deposited with the Treasurer as long as such depreciation continues. And the Comptroller, upon the terms prescribed by the Secretary of the Treasury, may permit an exchange to be made of any of the bonds deposited with the Treasurer by any association, for other bonds of the

United States authorized to be received as security for circulating notes, if he is of opinion that such an exchange can be made without prejudice to the United States; and he may direct the return of any bonds to the association which transferred the same, in sums of not less than one thousand dollars, upon the surrender to him and the cancellation of a proportionate amount of such circulating notes: *Provided*, That the remaining bonds which shall have been transferred by the association offering to surrender circulating notes are equal to the amount required for the circulating notes not surrendered by such association, and that the amount of bonds in the hands of the Treasurer is not diminished below the amount required to be kept on deposit with him, and that there has been no failure by the association to redeem its circulating notes, nor any other violation by it of the provisions of this Title, and that the market or cash value of the remaining bonds is not below the amount required for the circulation issued for the same.

§ 27. (5187.) **Penalties for imitating or defacing Notes or issuing them to unauthorized Associations.** — No officer acting under the provisions of this Title shall countersign or deliver to any association, or to any other company or person, any circulating notes contemplated by this Title, except in accordance with the true intent and meaning of its provisions. Every officer who violates this section shall be deemed guilty of a high misdemeanor, and shall be fined not more than double the amount so countersigned and delivered, and imprisoned not less than one year and not more than fifteen years.

(5188.) — It shall not be lawful to design, engrave, print, or in any manner make or execute, or to utter, issue, distribute, circulate, or use, any business or professional card, notice, placard, circular, hand-bill, or advertisement, in the likeness or similitude of any circulating note or other obligation or security of any banking association organized or acting under the laws of the United States which has been or may be issued under this Title, or any act of Congress, or to write, print, or otherwise impress upon any such note, obligation, or security any business or professional card, notice or advertisement, or

any notice or advertisement of any matter or thing whatever. Every person who violates this section shall be liable to a penalty of one hundred dollars, recoverable one half to the use of the informer.

(5189.) — Every person who mutilates, cuts, defaces, disfigures, or perforates with holes, or unites or cements together, or does any other thing to any bank bill, draft, note, or other evidence of debt, issued by any national banking association, or who causes or procures the same to be done, with intent to render such bank bill, draft, note, or other evidence of debt unfit to be reissued by said association, shall be liable to a penalty of fifty dollars, recoverable by the association.

§ 28. (5137). **Realty, Power to hold.**[1] — A national banking association may purchase, hold, and convey real estate for the following purposes, and for no others: —

First. Such as shall be necessary for its immediate accommodation in the transaction of its business.

Second. Such as shall be mortgaged to it in good faith by way of security for debts previously contracted.

Third. Such as shall be conveyed to it in satisfaction of debts previously contracted in the course of its dealings.

Fourth. Such as it shall purchase at sales under judgments, decrees, or mortgages held by the association, or shall purchase to secure debts due to it.

But no such association shall hold the possession of any real estate under mortgage, or the title and possession of any real estate purchased to secure any debts due to it, for a longer period than five years.

§ 29. (5200.) **Limit of Liability of one Person or Firm.**[2] — The total liabilities to any association, of any person, or of any company, corporation, or firm for money borrowed, including, in the liabilities of a company or firm, the liabilities of the several members thereof, shall at no time exceed one tenth part of the amount of the capital stock of such association actually paid in.[3] But the discount of bills of exchange drawn in good faith against actually existing values, and the

[1] § 128. Kansas Valley Bank *v.* Rowell, 2 Dill. 371.

[2] § 129.

[3] See *Ultra vires*, Legislative Intent.

discount of commercial or business paper actually owned by the person negotiating the same, shall not be considered as money borrowed.

§ 30. (5197.) **Interest, what Rate may be taken.**[1] — Any association may take, receive, reserve, and charge on any loan or discount made, or upon any note, bill of exchange, or other evidences of debt, interest at the rate allowed by the laws of the State, Territory, or district where the bank is located, and no more, except that where by the laws of any State a different rate is limited for banks of issue[2] organized under State laws, the rate so limited shall be allowed for associations organized or existing in any such State under this Title. When no rate is fixed by the laws of the State, or Territory, or district, the bank may take, receive, reserve, or charge a rate not exceeding seven per centum, and such interest may be taken in advance, reckoning the days for which the note, bill, or other evidence of debt has to run. And the purchase, discount, or sale of a *bona fide* bill of exchange, payable at another place than the place of such purchase, discount, or sale, at not more than the current rate of exchange for sight drafts in addition to the interest, shall not be considered as taking or receiving a greater rate of interest.

(5198.) **Usury, Consequences of.**[3] — The taking, receiving, reserving, or charging a rate of interest greater than is allowed by the preceding section, when knowingly done, shall be deemed a forfeiture of the entire interest which the note, bill, or other evidence of debt carries with it, or which has been agreed to be paid thereon. In case the greater rate of interest has been paid, the person by whom it has been paid, or his legal representatives, may recover back, in an action in the nature of an action of debt, twice the amount of the interest thus paid from the association taking or receiving the same; provided such action is commenced within two years

[1] § 130. Tiffany *v.* National Bank of Missouri, 18 Wall. 409; In re Alfred Wild, 11 Blatchf. 243.

[2] See § 130 *z*.

[3] § 130. 18 February, 1875. See for full text, § 84 *c*. Farmers', &c. Bank *v.* Dearing, 91 U. S. 29.

from the time the usurious transaction occurred. [That suits, actions, and proceedings against any association under this title may be had in any Circuit, District, or Territorial court of the United States held within the district in which such association may be established, or in any State, county, or municipal court in the county or city in which said association is located having jurisdiction in similar cases.]

§ 31. (5191.) **Reserve and what may be counted toward it.**[1] —Every national banking association in either of the following cities: Albany, Baltimore, Boston, Cincinnati, Chicago, Cleveland, Detroit, Louisville, Milwaukee, New Orleans, New York, Philadelphia, Pittsburgh, Saint Louis, San Francisco, and Washington, shall at all times have on hand, in lawful money of the United States, an amount equal to at least twenty-five per centum of the aggregate amount of its notes in circulation and its deposits; and every other association shall at all times have on hand, in lawful money of the United States, an amount equal to at least fifteen per centum of the aggregate amount of its notes in circulation and of its deposits. Whenever the lawful money of any association in any of the cities named shall be below the amount of twenty-five per centum of its circulation and deposits, and whenever the lawful money of any other association shall be below fifteen per centum of its circulation and deposits, such association shall not increase its liabilities by making any new loans or discounts otherwise than by discounting or purchasing bills of exchange payable at sight, nor make any dividend of its profits until the required proportion between the aggregate amount of its outstanding notes of circulation and deposits and its lawful money of the United States has been restored. And the Comptroller of the Currency may notify any association, whose lawful money reserve shall be below the amount above required to be kept on hand, to make good such reserve; and if such association shall fail for thirty days thereafter so to make good its reserve of lawful money, the Comptroller may, with the concurrence of the Secretary of the Treasury, appoint a receiver to wind up the business of

[1] 20 June, 1874, § 84 *a*. 1 March, 1872. See §§ 78, 83.

the association, as provided in section fifty-two hundred and thirty-four.

(5192.)[1] — Three fifths of the reserve of fifteen per centum required by the preceding section to be kept, may consist of balances due to an association, available for the redemption of its circulating notes, from associations approved by the Comptroller of the Currency, organized under the act of June three, eighteen hundred and sixty-four, or under this Title, and doing business in the cities of Albany, Baltimore, Boston, Charleston, Chicago, Cincinnati, Cleveland, Detroit, Louisville, Milwaukee, New Orleans, New York, Philadelphia, Pittsburgh, Richmond, Saint Louis, San Francisco, and Washington. Clearing-house certificates, representing specie or lawful money specially deposited for the purpose, of any clearing-house association, shall also be deemed to be lawful money in the possession of any association belonging to such clearing-house, holding and owning such certificate, within the preceding section.

(5193.)[2] — The Secretary of the Treasury may receive United States notes on deposit, without interest, from any national banking associations, in sums of not less than ten thousand dollars, and issue certificates therefor in such form as he may prescribe, in denominations of not less than five thousand dollars, and payable on demand in United States notes at the place where the deposits were made. The notes so deposited shall not be counted as part of the lawful money reserve of the association; but the certificates issued therefor may be counted as part of its lawful money reserve, and may be accepted in the settlement of clearing-house balances at the places where the deposits therefor were made.

(5194.) — The power conferred on the Secretary of the Treasury, by the preceding section, shall not be exercised so as to create any expansion or contraction of the currency. And United States notes for which certificates are issued under that section, or other United States notes of like amount, shall be held as special deposits in the Treasury, and used only for the redemption of such certificates.

[1] 20 June, 1874, § 84 *a*. See § 83. [2] 8 June, 1872.

§ 32. (*a*) (5195.) **Place for Redemption of Notes.**[1] — Each association organized in any of the cities named in section fifty-one hundred and ninety-one shall select, subject to the approval of the Comptroller of the Currency, an association in the city of New York, at which it will redeem its circulating notes at par; and may keep one half of its lawful money reserve in cash deposits in the city of New York. But the foregoing provision shall not apply to associations organized and located in the city of San Francisco for the purpose of issuing notes payable in gold. Each association not organized within the cities named shall select, subject to the approval of the Comptroller, an association in either of the cities named, at which it will redeem its circulating notes at par. The Comptroller shall give public notice of the names of the associations selected, at which redemptions are to be made by the respective associations, and of any change that may be made of the association at which the notes of any association are redeemed. Whenever any association fails either to make the selection or to redeem its notes as aforesaid, the Comptroller of the Currency may, upon receiving satisfactory evidence thereof, appoint a receiver, in the manner provided for in section fifty-two hundred and thirty-four, to wind up its affairs. But this section shall not relieve any association from its liability to redeem its circulating notes at its own counter, at par, in lawful money on demand.

(*b*) (5196.) **National Bank's Duty to receive the Notes of other National Banks at Par, except.**[2] — Every national banking association formed or existing under this Title shall take and receive at par, for any debt or liability to it, any and all notes or bills issued by any lawfully organized national banking association. But this provision shall not apply to any association organized for the purpose of issuing notes payable in gold.

§ 33. (5199.) **Dividends declared by Directors.** — The directors of any association may, semiannually, declare a dividend of so much of the net profits of the association as they shall judge expedient; but each association shall, before the declaration of a dividend, carry one tenth part of its net profits

[1] 20 June, 1874, § 84 *a*. See § 83. [2] 12 July, 1870.

of the preceding half-year to its surplus fund, until the same shall amount to twenty per centum of its capital stock.

§ 34. (5211.) **Reports to Comptroller.**[1] — Every association shall make to the Comptroller of the Currency not less than five reports during each year, according to the form which may be prescribed by him, verified by the oath or affirmation of the president or cashier of such association, and attested by the signature of at least three of the directors. Each such report shall exhibit, in detail and under appropriate heads, the resources and liabilities of the [*associations*] [association] at the close of business on any past day by him specified; and shall be transmitted to the Comptroller within five days after the receipt of a request or requisition therefor from him, and in the same form in which it is made to the Comptroller shall be published in a newspaper published in the place where such association is established, or, if there is no newspaper in the place, then in the one published nearest thereto in the same county, at the expense of the association; and such proof of publication shall be furnished as may be required by the Comptroller. The Comptroller shall also have power to call for special reports from any particular association whenever, in his judgment, the same are necessary in order to a full and complete knowledge of its condition.

(5212.) — **Report as to Dividends.**[2] — In addition to the reports required by the preceding section, each association shall report to the Comptroller of the Currency, within ten days after declaring any dividend, the amount of such dividend, and the amount of net earnings in excess of such dividend. Such reports shall be attested by the oath of the president or cashier of the association.

(5213.) — **Penalty for Failure to make Reports.**[2] — Every association which fails to make and transmit any report required under either of the two preceding sections shall be subject to a penalty of one hundred dollars for each day after the periods, respectively, therein mentioned, that it delays to make and transmit its report. Whenever any association

[1] 30 June, 1876. See § 84 *g* and § 66.

[2] 30 June, 1876. See § 84 *g*.

delays or refuses to pay the penalty herein imposed, after it has been assessed by the Comptroller of the Currency, the amount thereof may be retained by the Treasurer of the United States, upon the order of the Comptroller of the Currency, out of the interest, as it may become due to the association, on the bonds deposited with him to secure circulation. All sums of money collected for penalties under this section shall be paid into the Treasury of the United States.

30 June, 1876, Sec. 6. That all savings banks or savings and trust companies organized under authority of any act of Congress shall be, and are hereby, required to make, to the Comptroller of the Currency, and publish, all the reports which national banking associations are required to make and publish under the provisions of sections fifty-two hundred and eleven, fifty-two hundred and twelve, and fifty-two hundred and thirteen, of the Revised Statutes, and shall be subject to the same penalties for failure to make or publish such reports as are therein provided; which penalties may be collected by suit before any court of the United States in the district in which said savings banks or savings and trust companies may be located. And all savings or other banks now organized, or which shall hereafter be organized, in the District of Columbia, under any act of Congress, which shall have capital stock paid up in whole or in part, shall be subject to all the provisions of the Revised Statutes, and of all acts of Congress applicable to national banking associations, so far as the same may be applicable to such savings or other banks: *Provided*, That such savings banks now established shall not be required to have a paid-in capital exceeding one hundred thousand dollars.

§ 35. (5201.) **Banks not to loan on or purchase their own Stock.**[1] — No association shall make any loan or discount on the security of the shares of its own capital stock, nor be the purchaser or holder of any such shares, unless such security or purchase shall be necessary to prevent loss upon a debt previously contracted in good faith; and stock so purchased or acquired shall, within six months from the time of its purchase, be sold or disposed of at public or private sale; or, in default thereof, a receiver may be appointed to close up the

[1] § 135. Bank *v.* Lanier, 11 Wall. 369; Ballard *v.* Bank, 18 Wall. 589.

business of the association, according to section fifty-two hundred and thirty-four.

§ 36. (5202.) **Limit to Bank's Indebtedness.** — No association shall at any time be indebted, or in any way liable, to an amount exceeding the amount of its capital stock at such time actually paid in and remaining undiminished by losses or otherwise, except on account of demands of the nature following: —

First. Notes of circulation.

Second. Moneys deposited with or collected by the association.

Third. Bills of exchange or drafts drawn against money actually on deposit to the credit of the association, or due thereto.

Fourth. Liabilities to the stockholders of the association for dividends and reserved profits.

§ 37. (5203.) **Not to use Circulation to increase Capital.** — No association shall, either directly or indirectly, pledge or hypothecate any of its notes or circulation, for the purpose of procuring money to be paid in on its capital stock, or to be used in its banking operations, or otherwise; nor shall any association use its circulating notes, or any part thereof, in any manner or form, to create or increase its capital stock.

§ 38. (*a*) (5204.) **Not to withdraw Capital.** — No association, or any member thereof, shall, during the time it shall continue its banking operations, withdraw, or permit to be withdrawn, either in the form of dividends or otherwise, any portion of its capital. If losses have at any time been sustained by any such association, equal to or exceeding its undivided profits then on hand, no dividend shall be made; and no dividend shall ever be made by any association, while it continues its banking operations, to an amount greater than its net profits then on hand, deducting therefrom its losses and bad debts. All debts due to any associations, on which interest is past due and unpaid for a period of six months, unless the same are well secured, and in process of collection, shall be considered bad debts within the meaning of this section. But nothing in this section shall prevent the reduction

of the capital stock of the association under section fifty-one hundred and forty-three.

(*b*) (5205.) **Enforcing Payment of Deficiency in Capital Stock.**[1] — Every association which shall have failed to pay up its capital stock, as required by law, and every association whose capital stock shall have become impaired by losses or otherwise, shall, within three months after receiving notice thereof from the Comptroller of the Currency, pay the deficiency in the capital stock, by assessment upon the shareholders pro rata for the amount of capital stock held by each; and the Treasurer of the United States shall withhold the interest upon all bonds held by him in trust for any such association, upon notification from the Comptroller of the Currency, until otherwise notified by him. If any such association shall fail to pay up its capital stock, and shall refuse to go into liquidation, as provided by law, for three months after receiving notice from the Comptroller, a receiver may be appointed to close up the business of the association, according to the provisions of section fifty-two hundred and thirty-four. [*And provided*, That if any shareholder or shareholders of such bank shall neglect or refuse, after three months' notice, to pay the assessment, as provided in this section, it shall be the duty of the board of directors to cause a sufficient amount of the capital stock of such shareholder or shareholders to be sold at public auction (after thirty days' notice shall be given by posting such notice of sale in the office of the bank, and by publishing such notice in a newspaper of the city or town in which the bank is located, or in a newspaper published nearest thereto) to make good the deficiency, and the balance, if any, shall be returned to such delinquent shareholder or shareholders.]

§ 39. (5206.) **Restriction on Use of Notes of other Banks.** — No association shall at any time pay out on loans or discounts, or in purchasing drafts or bills of exchange, or in payment of deposits, or in any other mode pay or put in circulation, the notes of any bank or banking association which are not, at any such time, receivable, at par, on deposit

[1] 30 June, 1876. See § 84 *g*.

and in payment of debts, by the association so paying out or circulating such notes; nor shall any association knowingly pay out or put in circulation any notes issued by any bank or banking association which at the time of such paying out or putting in circulation is not redeeming its circulating notes in lawful money of the United States.

(5207.) **Notes of United States not to be held as collateral.**[1] — No association shall hereafter offer or receive United States notes or national bank notes as security or as collateral security for any loan of money, or for a consideration agree to withhold the same from use, or offer or receive the custody or promise of custody of such notes as security, or as collateral security, or consideration for any loan of money. Any association offending against the provisions of this section shall be deemed guilty of a misdemeanor, and shall be fined not more than one thousand dollars and a further sum equal to one third of the money so loaned. The officer or officers of any association who shall make any such loan shall be liable for a further sum equal to one quarter of the money loaned; and any fine or penalty incurred by a violation of this section shall be recoverable for the benefit of the party bringing such suit.

§ 40. (5210.) **List of Shareholders.** — The president and cashier of every national banking association shall cause to be kept at all times a full and correct list of the names and residences of all the shareholders in the association, and the number of shares held by each, in the office where its business is transacted. Such list shall be subject to the inspection of all the shareholders and creditors of the association, and the officers authorized to assess taxes under State authority, during business hours of each day in which business may be legally transacted. A copy of such list, on the first Monday of July of each year, verified by the oath of such president or cashier, shall be transmitted to the Comptroller of the Currency.

§ 41. (5173.) **Plates and Dies.** — The plates and special dies to be procured by the Comptroller of the Currency for the printing of such circulating notes shall remain under his control and direction, and the expenses necessarily incurred in

[1] 19 February, 1869. See § 78.

executing the laws respecting the procuring of such notes, and all other expenses of the Bureau of the Currency, shall be paid out of the proceeds of the taxes or duties assessed and collected on the circulation of national banking associations under this Title.

(5174.) — The Comptroller of the Currency shall cause to be examined, each year, the plates, dies, [*but pieces*] [bed-pieces], and other material from which the national bank circulation is printed, in whole or in part, and file in his office annually a correct list of the same. Such material as shall have been used in the printing of the notes of associations which are in liquidation, or have closed business, shall be destroyed under such regulations as shall be prescribed by the Comptroller of the Currency and approved by the Secretary of the Treasury. The expenses of any such examination or destruction shall be paid out of any appropriation made by Congress for the special examination of national banks and bank-note plates.

(5214.) **Taxes. — Duties to United States.**[1] — In lieu of all existing taxes, every association shall pay to the Treasurer of the United States, in the months of January and July, a duty of one half of one per centum each half-year upon the average amount of its notes in circulation, and a duty of one quarter of one per centum each half-year upon the average amount of its deposits, and a duty of one quarter of one per centum each half-year on the average amount of its capital stock, beyond the amount invested in United States bonds.

(5215.) **Tax Return to Treasurer.** — In order to enable the Treasurer to assess the duties imposed by the preceding section, each association shall, within ten days from the first days of January and July of each year, make a return, under the oath of its president or cashier, to the Treasurer of the United States, in such form as the Treasurer may prescribe, of the average amount of its notes in circulation, and of the average amount of its deposits, and of the average amount of its capital stock, beyond the amount invested in United States

[1] See §§ 77, 80. Tappan *v.* Merchants' National Bank, 19 Wall. 490.

bonds, for the six months next preceding the most recent first day of January or July. Every association which fails so to make such return shall be liable to a penalty of two hundred dollars, to be collected either out of the interest as it may become due such association on the bonds deposited with the Treasurer, or, at his option, in the manner in which penalties are to be collected of other corporations under the laws of the United States.

(5216.) **Penalty for Failure to make Return.** — Whenever any association fails to make the half-yearly return required by the preceding section, the duties to be paid by such association shall be assessed upon the amount of notes delivered to such association by the Comptroller of the Currency, and upon the highest amount of its deposits and capital stock, to be ascertained in such manner as the Treasurer may deem best.

(5217.) **Penalty for Failure to pay Duties.** — Whenever an association fails to pay the duties imposed by the three preceding sections, the sums due may be collected in the manner provided for the collection of United States taxes from other corporations; or the Treasurer may reserve the amount out of the interest, as it may become due, on the bonds deposited with him by such defaulting association.

(5218.) **Refunding excessive Duties.** — In all cases where an association has paid or may pay in excess of what may be or has been found due from it, on account of the duty required to be paid to the Treasurer of the United States, the association may state an account therefor, which, on being certified by the Treasurer of the United States, and found correct by the First Comptroller of the Treasury, shall be refunded in the ordinary manner by warrant on the Treasury.

(5219.) **State Taxation.**[1] — Nothing herein shall prevent all the shares in any association from being included in the valuation of the personal property of the owner or holder of

[1] See § 141. Bank of Commerce *v.* New York City, 2 Bl. 620; Van Allen *v.* The Assessors, 3 Wall. 573; People *v.* The Commissioners, 4 Wall. 244; Bradley *v.* The People, 4 Wall. 459; National Bank *v.* The Commonwealth, 9 Wall. 353; Lionberger *v.* Rouse, 9 Wall. 468; Hepburn *v.* The School Directors, 23 Wall. 480; People *v.* Commissioners of Taxes,

such shares, in assessing taxes imposed by authority of the State within which the association is located; but the legislature of each State may determine and direct the manner and place of taxing all the shares of national banking associations located within the State, subject only to the two restrictions, that the taxation shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State, and that the shares of any national banking association owned by non-residents of any State shall be taxed in the city or town where the bank is located, and not elsewhere. Nothing herein shall be construed to exempt the real property of associations from either State, county, or municipal taxes, to the same extent, according to its value, as other real property is taxed.

(3413.) **Tax on Municipal Notes.** — Every national banking association, State bank, or banker, or association, shall pay a tax of ten per centum on the amount of notes of any town, city, or municipal corporation, paid out by them.

(3417.) **Exemption of National Banks.** — The provisions of this chapter, relating to the tax on the deposits, capital, and circulation of banks, and to their returns, except as contained in sections thirty-four hundred and ten, thirty-four hundred and eleven, thirty-four hundred and twelve, [thirty-four hundred and thirteen], and thirty-four hundred and sixteen, and such parts of sections thirty-four hundred and fourteen and thirty-four hundred and fifteen as relate to the tax of ten per centum on certain notes, shall not apply to associations which are taxed under and by virtue of Title "National Banks."

§§ 42, 43. Voluntary Dissolution.

(*a*) (5220.) **Two-thirds Vote.**[1] — Any association may go into liquidation and be closed by the vote of its shareholders owning two thirds of its stock.

&c., 94 U. S. 415; Bank of Omaha *v.* Douglas Co., 3 Dill. 299; First National Bank *v.* Douglas Co., 3 Dill. 330.

[1] See §§ 142, 143. 30 June, 1876, see § 84 *g*. In re Manufacturers' National Bank, 5 Biss. 499.

(*b*) (5221.) **Notice of Intent to Dissolve.** — Whenever a vote is taken to go into liquidation it shall be the duty of the board of directors to cause notice of this fact to be certified, under the seal of the association, by its president or cashier, to the Comptroller of the Currency, and publication thereof to be made for a period of two months in a newspaper published in the city of New York, and also in a newspaper published in the city or town in which the association is located, or if no newspaper is there published, then in the newspaper published nearest thereto, that the association is closing up its affairs, and notifying the holders of its notes and other creditors to present the notes and other claims against the association for payment.

(*c*) (5222.) **Deposit to Redeem Circulation.**[1] — Within six months from the date of the vote to go into liquidation, the association shall deposit with the Treasurer of the United States lawful money of the United States sufficient to redeem all its outstanding circulation. The Treasurer shall execute duplicate receipts for money thus deposited, and deliver one to the association and the other to the Comptroller of the Currency, stating the amount received by him, and the purpose for which it has been received; and the money shall be paid into the Treasury of the United States, and placed to the credit of such association upon redemption account.

(*d*) (5223.) **Except a Bank wishing to Consolidate with another.** — An association which is in good faith winding up its business for the purpose of consolidating with another association shall not be required to deposit lawful money for its outstanding circulation; but its assets and liabilities shall be reported by the association with which it is in process of consolidation.

(*e*) (5224.) **Re-assignment of Bonds and Redemption of Notes.**[2] — Whenever a sufficient deposit of lawful money to redeem the outstanding circulation of an association proposing to close its business has been made, the bonds de-

[1] 20 June, 1874. See § 84 *a*.

[2] 18 February, 1875. See § 84 *e*.

posited by the association to secure payment of its notes shall be re-assigned to it, in the manner prescribed by section fifty-one hundred and sixty-two. And thereafter the association and its shareholders shall stand discharged from all liabilities upon the circulating notes, and those notes shall be redeemed at the Treasury of the United States. [And if any such bank shall fail to make the deposit and take up its bonds for thirty days after the expiration of the time specified, the Comptroller of the Currency shall have power to sell the bonds pledged for the circulation of said bank, at public auction in New York City, and, after providing for the redemption and cancellation of said circulation and the necessary expenses of the sale, to pay over any balance remaining to the bank or its legal representative.]

(*f*) (5225.) **Destruction of Notes.** — Whenever the Treasurer has redeemed any of the notes of an association which has commenced to close its affairs under the [*six*] [five] preceding sections, he shall cause the notes to be mutilated and charged to the redemption account of the association; and all notes so redeemed by the Treasurer shall, every three months, be certified to and burned in the manner prescribed in section fifty-one hundred and eighty-four.

§ 44. (5154.) **Change of State Bank to a National Bank.**[1] — Any bank incorporated by special law, or any banking institution organized under a general law of any State, may become a national association under this Title by the name prescribed in its organization certificate; and in such case the articles of association and the organization certificate may be executed by a majority of the directors of the bank or banking institution; and the certificate shall declare that the owners of two thirds of the capital stock have authorized the directors to make such certificate, and to change and convert the bank or banking institution into a national association. A majority of the directors, after executing the articles of association and organization certificate, shall have power to execute all other papers, and to do whatever may be required to make its organization perfect and complete as a national association. The shares of any

[1] See § 144, and § 65.

such bank may continue to be for the same amount each as they were before the conversion, and the directors may continue to be the directors of the association until others are elected or appointed in accordance with the provisions of this chapter; and any State bank which is a stockholder in any other bank, by authority of State laws, may continue to hold its stock, although either bank, or both, may be organized under and have accepted the provisions of this Title. When the Comptroller of the Currency has given to such association a certificate, under his hand and official seal, that the provisions of this title have been complied with, and that it is authorized to commence the business of banking, the association shall have the same powers and privileges, and shall be subject to the same duties, responsibilities, and rules, in all respects, as are prescribed for other associations originally organized as national banking associations, and shall be held and regarded as such an association. But no such association shall have a less capital than the amount prescribed for associations organized under this Title.

(5155.) — It shall be lawful for any bank or banking association organized under State laws, and having branches, the capital being joint and assigned to and used by the mother bank and branches in definite proportions, to become a national banking association in conformity with existing laws, and to retain and keep in operation its branches, or such one or more of them as it may elect to retain; the amount of the circulation redeemable at the mother bank, and each branch to be regulated by the amount of capital assigned to and used by each.

(3416.) — Whenever any State bank or banking association has been converted into a national banking association, and such national banking association has assumed the liabilities of such State bank or banking association, including the redemption of its bills, by any agreement or understanding whatever with the representatives of such State bank or banking association, such national banking association shall be held to make the required return and payment on the circulation outstanding, so long as such circulation shall exceed

five per centum of the capital before such conversion of such State bank or banking association.

§ 45. (5153.) **Depositaries of Public Moneys. Banks designated as such.**[1] — All national banking associations, designated for that purpose by the Secretary of the Treasury, shall be depositaries of public money, except receipts from customs, under such regulations as may be prescribed by the Secretary; and they may also be employed as financial agents of the Government; and they shall perform all such reasonable duties, as depositaries of public moneys and financial agents of the Government, as may be required of them. The Secretary of the Treasury shall require the associations thus designated to give satisfactory security, by the deposit of United States bonds and otherwise, for the safe keeping and prompt payment of the public money deposited with them, and for the faithful performance of their duties as financial agents of the Government. And every association so designated as receiver or depositary of the public money shall take and receive at par all of the national currency bills, by whatever association issued, which have been paid into the Government for internal revenue, or for loans or stocks.

§ 46. (5226.) **Failure to Redeem, and Protest of Notes.**[2] — Whenever any national banking association fails to redeem in the lawful money of the United States any of its circulating notes, upon demand of payment duly made during the usual hours of business, at the office of such association, or at its designated place of redemption, the holder may cause the same to be protested, in one package, by a notary public, unless the president or cashier of the association whose notes are presented for payment, or the president or cashier of the association at the place at which they are redeemable offers to waive demand and notice of the protest, and, in pursuance of such offer, makes, signs, and delivers to the party making such demand an admission in writing, stating the time of the demand, the amount demanded, and the fact of the non-

[1] See § 145. Branch's Case, 13 Ct. of Claims, 281. See R. S. §§ 3639, 3649, 5489.

[2] See §§ 146–152.

payment thereof. The notary public, on making such protest, or upon receiving such admission, shall forthwith forward such admission or notice of protest to the Comptroller of the Currency, retaining a copy thereof. If, however, satisfactory proof is produced to the notary public that the payment of the notes demanded is restrained by order of any court of competent jurisdiction, he shall not protest the same. When the holder of any notes causes more than one note or package to be protested on the same day, he shall not receive pay for more than one protest.

(5228.) **Continuing Business after Default.**[1] — After a default on the part of an association to pay any of its circulating notes has been ascertained by the Comptroller, and notice [*of forfeiture of the bonds*] [thereof] has been given by him to the association, it shall not be lawful for the association suffering the same to pay out any of its notes, discount any notes or bills, or otherwise prosecute the business of banking, except to receive and safely keep money belonging to it, and to deliver special deposits.

§ 47. (*a*) (5227.) **Examination by Special Agent.** — On receiving notice that any national banking association has failed to redeem any of its circulating notes, as specified in the preceding section, the Comptroller of the Currency, with the concurrence of the Secretary of the Treasury, may appoint a special agent, of whose appointment immediate notice shall be given to such association, who shall immediately proceed to ascertain whether it has refused to pay its circulating notes in the lawful money of the United States, when demanded, and shall report to the Comptroller the fact so ascertained. If, from such protest, and the report so made, the Comptroller is satisfied that such association has refused to pay its circulating notes, and is in default, he shall, within thirty days after he has received notice of such failure, declare the bonds deposited by such association forfeited to the United States, and they shall thereupon be so forfeited.

(*b*) (5229.) **Notice to Holders.** — Immediately upon declaring the bonds of an association forfeited for nonpayment of

[1] 18 February, 1875. See § 84 *c*, and §§ 146–152.

its notes, the Comptroller shall give notice, in such manner as the Secretary of the Treasury shall, by general rules or otherwise, direct, to the holders of the circulating notes of such association, to present them for payment at the Treasury of the United States; and the same shall be paid as presented in lawful money of the United States; whereupon the Comptroller may, in his discretion, cancel an amount of bonds pledged by such association equal at current market rates, not exceeding par, to the notes paid.

(*c*) (5232.) **Redemption at Treasury.** — The Secretary of the Treasury may, from time to time, make such regulations respecting the disposition to be made of circulating notes after presentation at the Treasury of the United States for payment, and respecting the perpetuation of the evidence of the payment thereof, as may seem to him proper.

(*d*) (5233.) **Bonds and Notes Cancelled.**[1] — All notes of national banking associations presented at the Treasury of the United States for payment shall, on being paid, be cancelled.

§ 48. (5230.) **Auction Sale of Bonds.** — Whenever the Comptroller has become satisfied, by the protest or the waiver and admission specified in section fifty-two hundred and twenty-six, or by the report provided for in section fifty-two hundred and twenty-seven, that any association has refused to pay its circulating notes, he may, instead of cancelling its bonds, cause so much of them as may be necessary to redeem its outstanding notes to be sold at public auction in the city of New York, after giving thirty days' notice of such sale to the association. For any deficiency in the proceeds of all the bonds of an association, when thus sold, to reimburse to the United States the amount expended in paying the circulating notes of the association, the United States shall have a paramount lien upon all its assets; and such deficiency shall be made good out of such assets in preference to any and all other claims whatsoever, except the necessary costs and expenses of administering the same.

§ 49. (5231.) **Sale of Bonds at Private Sale.** — The Comptroller may, if he deems it for the interest of the United

[1] See §§ 146–152.

States, sell at private sale any of the bonds of an association shown to have made default in paying its notes, and receive therefor either money or the circulating notes of the association. But no such bonds shall be sold by private sale for less than par, nor for less than the market value thereof at the time of sale; and no sales of any such bonds, either public or private, shall be complete until the transfer of the bonds shall have been made with the formalities prescribed by sections fifty-one hundred and sixty-two, fifty-one hundred and sixty-three, and fifty-one hundred and sixty-four.

§ 50. (*a*) (5234.) **Appointment of Receiver.**[1] — On becoming satisfied, as specified in sections fifty-two hundred and twenty-six and fifty-two hundred and twenty-seven, that any association has refused to pay its circulating notes as therein mentioned, and is in default, the Comptroller of the Currency may forthwith appoint a receiver, and require of him such bond and security as he deems proper. Such receiver, under the direction of the Comptroller, shall take possession of the books, records, and assets of every description of such association, collect all debts, dues, and claims belonging to it, and, upon the order of a court of record of competent jurisdiction, may sell or compound all bad or doubtful debts, and, on a like order, may sell all the real and personal property of such association, on such terms as the court shall direct; and may, if necessary to pay the debts of such association, enforce the individual liability of the stockholders. Such receiver shall pay over all money so made to the Treasurer of the United States, subject to the order of the Comptroller, and also make report to the Comptroller of all his acts and proceedings.

(*b*) (5235.) **Notice to Present Claims.** — The Comptroller shall, upon appointing a receiver, cause notice to be given, by advertisement in such newspapers as he may direct, for three consecutive months, calling on all persons who may

[1] 30 June, 1876, § 84 *g*. Suits by, § 150. Kennedy *v.* Gibson, 8 Wall. 498; Bank of Bethel *v.* Pahquioque Bank, 14 Wall. 383; Bank *v.* Kennedy, 16 Wall. 19; In re Platt, Receiver, &c., 1 Ben. 534; Chemical National Bank *v.* Bailey, 12 Blatchf. 480; Cadle *v.* Baker, 20 Wall. 650.

have claims against such association to present the same, and to make legal proof thereof.

(*c*) (5236.) **Dividends.**[1] — From time to time, after full provision has been first made for refunding to the United States any deficiency in redeeming the notes of such association, the Comptroller shall make a ratable dividend of the money so paid over to him by such receiver on all such claims as may have been proved to his satisfaction or adjudicated in a court of competent jurisdiction, and, as the proceeds of the assets of such association are paid over to him, shall make further dividends on all claims previously proved or adjudicated; and the remainder of the proceeds, if any, shall be paid over to the shareholders of such association, or their legal representatives, in proportion to the stock by them respectively held.

(*d*) (5237.) **Injunction on Receiver.** — Whenever an association against which proceedings have been instituted, on account of any alleged refusal to redeem its circulating notes as aforesaid, denies having failed to do so, it may, at any time within ten days after it has been notified of the appointment of an agent, as provided in section fifty-two hundred and twenty-seven, apply to the nearest Circuit, or District, or Territorial court of the United States to enjoin further proceedings in the premises; and such court, after citing the Comptroller of the Currency to show cause why further proceedings should not be enjoined, and after the decision of the court or finding of a jury that such association has not refused to redeem its circulating notes, when legally presented, in the lawful money of the United States, shall make an order enjoining the Comptroller, and any receiver acting under his direction, from all further proceedings on account of such alleged refusal.

§ 51. (5238.) **Fees and Expenses.** — All fees for protesting the notes issued by any national banking association shall be paid by the person procuring the protest to be made, and such association shall be liable therefor; but no part of the bonds deposited by such association shall be applied to the payment

[1] See § 150, *c*. 30 June, 1876. See § 84 *g*.

of such fees. All expenses of any preliminary or other examinations into the condition of any association shall be paid by such association. All expenses of any receivership shall be paid out of the assets of such association before distribution of the proceeds thereof.

§ 52. (5242.) **Void Transfers. — Insolvency.**[1] — All transfers of the notes, bonds, bills of exchange, or other evidences of debt owing to any national banking association, or of deposits to its credit; all assignments of mortgages, sureties on real estate, or of judgments or decrees in its favor; all deposits of money, bullion, or other valuable thing for its use, or for the use of any of its shareholders or creditors; and all payments of money to either, made after the commission of an act of insolvency, or in contemplation thereof, made with a view to prevent the application of its assets in the manner prescribed by this chapter, or with a view to the preference of one creditor to another, except in payment of its circulating notes, shall be utterly null and void; and no attachment, injunction, or execution shall be issued against such association or its property before final judgment in any suit, action, or proceeding, in any State, county, or municipal court.

§ 53. (5239.) **Penalty for Violating the National Banking Laws.**[2] — If the directors of any national banking association shall knowingly violate, or knowingly permit any of the officers, agents, or servants of the association to violate any of the provisions of this Title, all the rights, privileges, and franchises of the association shall be thereby forfeited. Such violation shall, however, be determined and adjudged by a proper Circuit, District, or Territorial court of the United States, in a suit brought for that purpose by the Comptroller of the Currency, in his own name, before the association shall be declared dissolved. And in cases of such violation, every director who participated in or assented to the same shall be held liable in his personal and individual capacity for all damages which

[1] See § 152. National Bank *v.* Colby, 21 Wall. 609; Case *v.* Citizens' Bank, 2 Woods, 23; Casey *v.* Credit Mobilier, 2 Woods, 77; Irons *v.* Manufacturers' National Bank, 6 Biss. 301.

[2] See § 153. 30 June, 1876. See § 84 *g*.

the association, its shareholders, or any other person, shall have sustained in consequence of such violation.

§ 54. (5240.) **Examiners, Appointment of Occasional.**[1] — The Comptroller of the Currency, with the approval of the Secretary of the Treasury, shall, as often as shall be deemed necessary or proper, appoint a suitable person or persons to make an examination of the affairs of every banking association, who shall have power to make a thorough examination into all the affairs of the association, and, in doing so, to examine any of the officers and agents thereof on oath; and shall make a full and detailed report of the condition of the association to the Comptroller. [*Every person appointed to make such examination shall receive for his services at the rate of five dollars for each day by him employed in such examination, and two dollars for every twenty-five miles he shall necessarily travel in the performance of his duty, which shall be paid by the association by him examined. But no person shall be appointed to examine the affairs of any banking association of which he is a director or other officer.*] [That all persons appointed to be examiners of national banks not located in the redemption cities specified in section five thousand one hundred and ninety-two of the Revised Statutes of the United States, or in any one of the States of Oregon, California, and Nevada, or in the Territories, shall receive compensation for such examination as follows: For examining national banks having a capital less than one hundred thousand dollars, twenty dollars; those having a capital of one hundred thousand dollars and less than three hundred thousand dollars, twenty-five dollars; those having a capital of three hundred thousand dollars and less than four hundred thousand dollars, thirty-five dollars; those having a capital of four hundred thousand dollars and less than five hundred thousand dollars, forty dollars; those having a capital of five hundred thousand dollars and less than six hundred thousand dollars, fifty dollars; those having a capital of six hundred thousand dollars and over, seventy-five dollars; which amounts shall be assessed by the Comptroller of the Currency upon, and

[1] 19 February, 1875. See § 81 *f*.

paid by, the respective associations so examined; and shall be in lieu of the compensation and mileage heretofore allowed for making said examinations, and persons appointed to make examination of national banks in the cities named in section five thousand one hundred and ninety-two of the Revised Statutes of the United States, or in any one of the States of Oregon California, and Nevada, or in the Territories, shall receive such compensation as may be fixed by the Secretary of the Treasury upon the recommendation of the Comptroller of the Currency; and the same shall be assessed and paid in the manner hereinbefore provided.]

(5241.) **Visitorial Powers over National Banks limited.** — No association shall be subject to any visitorial powers other than such as are authorized by this Title, or are vested in the courts of justice.

(5243.) **"National," Use of the Title.** — All banks not organized and transacting business under the national currency laws, or under this Title, and all persons or corporations doing the business of bankers, brokers, or savings institutions, except savings banks authorized by Congress to use the word "national" as a part of their corporate name, are prohibited from using the word "national" as a portion of the name or title of such bank, corporation, firm, or partnership; and any violation of this prohibition committed after the third day of September, eighteen hundred and seventy-three, shall subject the party chargeable therewith to a penalty of fifty dollars for each day during which it is committed or repeated.

§ 55. (5209.) **Embezzlement. — Penalty.**[1] — Every president, director, cashier, teller, clerk, or agent of any association, who embezzles, abstracts, or wilfully misapplies any of the moneys, funds, or credits of the association; or who, without authority from the directors, issues or puts in circulation any of the notes of the association; or who, without such authority, issues or puts forth any certificate of deposit, draws any order or bill of exchange, makes any acceptance, assigns any note, bond, draft, bill of exchange, mortgage, judgment, or decree; or who makes any false entry in any book, report,

[1] See § 159. United States *v.* Taintor, 11 Blatchf. 374.

or statement of the association, with intent, in either case, to injure or defraud the association or any other company, body politic or corporate, or any individual person, or to deceive any officer of the association, or any agent appointed to examine the affairs of any such association; and every person who with like intent aids or abets any officer, clerk, or agent in any violation of this section, shall be deemed guilty of a misdemeanor, and shall be imprisoned not less than five years nor more than ten.

(5208.) **False Certification. — Penalty.**[1] — It shall be unlawful for any officer, clerk, or agent of any national banking association to certify any check drawn upon the association unless the person or company drawing the check has on deposit with the association, at the time such check is certified, an amount of money equal to the amount specified in such check. Any check so certified by duly authorized officers shall be a good and valid obligation against the association; but the act of any officer, clerk, or agent of any association, in violation of this section, shall subject such bank to the liabilities and proceedings on the part of the Comptroller as provided for in section fifty-two hundred and thirty-four.

§ 56. (380.) **Suits arising under National Banking Laws to be conducted by District Attorneys.**[2] — All suits and proceedings arising out of the provisions of law governing national banking associations, in which the United States or any of its officers or agents shall be parties, shall be conducted by the district attorneys of the several districts under the direction and supervision of the Solicitor of the Treasury.

§ 57. Jurisdiction.[3]

(563.) **District Court.**[4] — The District Courts shall have jurisdiction as follows: —

Fifteenth. Of all suits by or against any association estab-

[1] § 159. See § 79.

[2] § 156. Kennedy *v.* Gibson, 8 Wall. 498.

[3] See §§ 70, 82.

[4] § 157. Kennedy *v.* Gibson, 8 Wall. 506; Cadle *v.* Tracy, 11 Blatchf. 101.

lished under any law providing for national banking associations within the district for which the court is held.

(629.) **Circuit Courts.**[1] — The Circuit Courts shall have original jurisdiction as follows: —

Tenth. Of all suits by or against any banking association established in the district for which the court is held, under any law providing for national banking associations.

Eleventh. Of all suits brought by [*or against*] any banking association established in the district for which the court is held, under the provisions of Title "The National Banks," to enjoin the Comptroller of the Currency, or any receiver acting under his direction, as provided by said title. See R. S. § 5237.

(640.) **Removal from State Courts.**[2] — Any suit commenced in any court other than a Circuit or District Court of the United States against any corporation other than a banking corporation, organized under a law of the United States, or against any member thereof as such member for any alleged liability of such corporation, or of such member as a member thereof, may be removed, for trial, in the Circuit Court for the district where such suit is pending, upon the petition of such defendant, verified by oath, stating that such defendant has a defence arising under or by virtue of the Constitution or of any treaty or law of the United States. Such removal, in all other respects, shall be governed by the provisions of the preceding section.

(736.) **Enjoining Comptroller.** — All proceedings by any national banking association to enjoin the Comptroller of the Currency, under the provisions of any law relating to national banking associations, shall be had in the district where such association is located.

§ 58. (5189.) See § 27.

§ 59. (5415.) **Counterfeiting National Bank Notes.**[3] — Every person who falsely makes, forges, or counterfeits, or causes or procures to be made, forged, or counterfeited, or will-

[1] § 157. See § 50 *d*. Kennedy *v.* Gibson, 8 Wall. 506.

[2] Attachments, § 157 *a*. Removal, § 157 *b*.

[3] See § 159.

ingly aids or assists in falsely making, forging, or counterfeiting, any note in imitation of, or purporting to be in imitation of, the circulating notes issued by any banking association now or hereafter authorized and acting under the laws of the United States; or who passes, utters, or publishes, or attempts to pass, utter, or publish, any false, forged, or counterfeited note, purporting to be issued by any such association doing a banking business, knowing the same to be falsely made, forged, or counterfeited, or who falsely alters, or causes or procures to be falsely altered, or willingly aids or assists in falsely altering any such circulating notes, or passes, utters, or publishes, or attempts to pass, utter, or publish as true, any falsely altered or spurious circulating note issued, or purporting to have been issued, by any such banking association, knowing the same to be falsely altered or spurious, shall be imprisoned at hard labor not less than five years, nor more than fifteen years, and fined not more than one thousand dollars.

§ 60. This section of the act of June 3, 1864, was not incorporated into the Revised Statutes. It concerns forgery of bank notes.

§ 61. (333.) See § 3 *c*.

§ 62. (5156.) **Banks Organized under Law of 1863 have their Rights Reserved.** — Nothing in this Title shall affect any appointments made, acts done, or proceedings had or commenced prior to the third day of June, eighteen hundred and sixty-four, in or toward the organization of any national banking association under the act of February twenty-five, eighteen hundred and sixty-three; but all associations which, on the third day of June, eighteen hundred and sixty-four, were organized or commenced to be organized under that act, shall enjoy all the rights and privileges granted, and be subject to all the duties, liabilities, and restrictions imposed by this Title, notwithstanding all the steps prescribed by this Title for the organization of associations were not pursued, if such associations were duly organized under that act.

(5157.) **To what Associations the above Provisions apply.** — The provisions of §§ 5157 to 5243 inclusive, which are ex-

pressed without restrictive words, as applying to "national banking associations," or to "associations," apply to all associations organized to carry on the business of banking under any act of Congress.

§ 63. (5152.) **Executors, Trustees, etc. Liability.** — Persons holding stock as executors, administrators, guardians, or trustees, shall not be personally subject to any liabilities as stockholders; but the estates and funds in their hands shall be liable in like manner and to the same extent as the testator, intestate, ward, or person interested in such trust funds would be, if living and competent to act and hold the stock in his own name.

SUBSEQUENT LAWS.

§ 64. An Act to Forbid the further Retirement of United States Legal Tender Notes.[1]

Be it enacted, That from and after the passage of this act it shall not be lawful for the Secretary of the Treasury or other officer under him, to cancel or retire any more of the United States legal tender notes, and when any of said notes may be redeemed or be received into the Treasury under any law, from any source whatever, and shall belong to the United States, they shall not be retired, cancelled, or destroyed, but they shall be reissued and paid out again and kept in circulation, provided that nothing herein shall prohibit the cancellation and destruction of mutilated notes and the issue of other notes of like denomination in their stead, as now provided by law. All acts or parts of acts in conflict herewith are hereby repealed.

§ 65. An Act authorizing the Conversion of National Gold Banks.[2]

National gold banks may become currency banks. Date of organization certificates.

Be it enacted, *&c.*, That any national gold bank organized under the provisions of the laws of the United States may, in

[1] 31 May, 1878.

[2] 14 February, 1880. See § 44.

the manner and subject to the provisions prescribed by section fifty-one hundred and fifty-four of the Revised Statutes of the United States, for the conversion of banks incorporated under the laws of any State, cease to be a gold bank, and become such an association as is authorized by section fifty-one hundred and thirty-three, for carrying on the business of banking, and shall have the same powers and privileges, and shall be subject to the same duties, responsibilities, and rules, in all respects, as are by law prescribed for such associations.

Provided, That all certificates of organization which shall be issued under this act shall bear the date of the original organization of each bank respectively as a gold bank.

§ 66. An Act defining the Verification of Returns of National Banks.[1]

Reports of national banks may be sworn to before a notary public, if not an officer of the bank.

Be it enacted, &c., That the oath or affirmation required by section fifty-two hundred and eleven of the Revised Statutes, verifying the returns made by national banks to the Comptroller of the Currency, when taken before a notary public properly authorized and commissioned by the State in which such notary resides and the bank is located, or any other officer having an official seal, authorized in such State to administer oaths, shall be a sufficient verification as contemplated by said section fifty-two hundred and eleven.

Provided, That the officer administering the oath is not an officer of the bank.

An Act to enable National Banking Associations to extend their Corporate Existence, and for other Purposes.[2]

§ 67. **Extension of Existence Twenty Years, unless.** — *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That any national banking association organized under the acts of February twenty-fifth, eighteen hundred and sixty-three, June

[1] February 26, 1881. See § 34.

[2] July 12, 1882. Chap. 290.

third, eighteen hundred and sixty-four, and February fourteenth, eighteen hundred and eighty, or under sections fifty-one hundred and thirty-three, fifty-one hundred and thirty-four, fifty-one hundred and thirty-five, fifty-one hundred and thirty-six, and fifty-one hundred and fifty-four of the Revised Statutes of the United States, may, at any time within the two years next previous to the date of the expiration of its corporate existence under present law, and with the approval of the Comptroller of the Currency, to be granted, as hereinafter provided, extend its period of succession by amending its articles of association for a term of not more than twenty years from the expiration of the period of succession named in said articles of association, and shall have succession for such extended period, *unless* sooner dissolved by the act of shareholders owning two thirds of its stock, or unless its franchise becomes forfeited by some violation of law, or unless hereafter modified or repealed.

§ 68. **Such Amendment of Articles of Association requires Consent of two thirds of the Stockholders.** — SEC. 2. That such amendment of said articles of association shall be authorized by the consent in writing of shareholders owning not less than two thirds of the capital stock of the association; and the board of directors shall cause such consent to be certified under the seal of the association, by its president or cashier, to the Comptroller of the Currency, accompanied by an application made by the president or cashier for the approval of the amended articles of association by the Comptroller; and such amended articles of association shall not be valid until the Comptroller shall give to such association a certificate under his hand and seal that the association has complied with all the provisions required to be complied with, and is authorized to have succession for the extended period named in the amended articles of association.

§ 69. **Comptroller's Examination.** — SEC. 3. That upon the receipt of the application and certificate of the association provided for in the preceding section, the Comptroller of the Currency shall cause a special examination to be made, at the

expense of the association, to determine its condition; and if after such examination or otherwise it appears to him that said association is in a satisfactory condition, he shall grant his certificate of approval, provided for in the preceding section, or if it appears that the condition of said association is not satisfactory, he shall withhold such certificate of approval.

§ 70. **Identity, Rights, and Liabilities preserved. — Jurisdiction of Suits.**[1] — SEC. 4. That any association so extending the period of its succession shall continue to enjoy all the rights and privileges and immunities granted, and shall continue to be subject to all the duties, liabilities, and restrictions imposed, by the Revised Statutes of the United States and other acts having reference to national banking associations, and it shall continue to be in all respects the identical association it was before the extension of its period of succession: *Provided, however*, That the jurisdiction for suits hereafter brought by or against any association established under any law providing for national banking associations, except suits between them and the United States, or its officers and agents, shall be the same as, and not other than, the jurisdiction for suits by or against banks not organized under any law of the United States which do or might do banking business where such national banking associations may be doing business when such suits may be begun: and all laws and parts of laws of the United States inconsistent with this proviso be, and the same are hereby, repealed.

§ 71. **Shareholder dissenting may withdraw.** — SEC. 5. That when any national banking association has amended its articles of association as provided in this act, and the Comptroller has granted his certificate of approval, any shareholder not assenting to such amendment may give notice in writing to the directors, within thirty days from the date of the certificate of approval, of his desire to withdraw from said association, in which case he shall be entitled to receive from said banking association the value of the shares so held by

[1] See § 57.

him, to be ascertained by an appraisal made by a committee of three persons, one to be selected by such shareholder, one by the directors, and the third by the first two; and in case the value so fixed shall not be satisfactory to any such shareholder, he may appeal to the Comptroller of the Currency, who shall cause a reappraisal to be made, which shall be final and binding; and if said reappraisal shall exceed the value fixed by said committee, the bank shall pay the expenses of said reappraisal, and otherwise the appellant shall pay said expenses; and the value so ascertained and determined shall be deemed to be a debt due, and be forthwith paid, to said shareholder from said bank; and the shares so surrendered and appraised shall, after due notice, be sold at public sale, within thirty days after the final appraisal provided in this section: *Provided*, That in the organization of any banking association intended to replace any existing banking association, and retaining the name thereof, the holders of stock in the expiring association shall be entitled to preference in the allotment of the shares of the new association in proportion to the number of shares held by them respectively in the expiring association.

§ 72. **Redemption of Circulation.**[1] — SEC. 6. That the circulating notes of any association so extending the period of its succession which shall have been issued to it prior to such extension shall be redeemed at the Treasury of the United States, as provided in section three of the act of June twentieth, eighteen hundred and seventy-four, entitled, "An Act fixing the amount of United States notes, providing for redistribution of national bank currency, and for other purposes," and such notes when redeemed shall be forwarded to the Comptroller of the Currency, and destroyed as now provided by law; and at the end of three years from the date of the extension of the corporate existence of each bank the association so extended shall deposit lawful money with the Treasurer of the United States sufficient to redeem the remainder of the circulation which was outstanding at the date of its extension, as provided in sections fifty-two hundred and

[1] R. S. 5222, 5224, 5225.

twenty-two, fifty-two hundred and twenty-four, and fifty-two hundred and twenty-five of the Revised Statutes; and any gain that may arise from the failure to present such circulating notes for redemption shall inure to the benefit of the United States; and from time to time, as such notes are redeemed or lawful money deposited therefor as provided herein, new circulating notes shall be issued as provided by this act, bearing such devices, to be approved by the Secretary of the Treasury, as shall make them readily distinguishable from the circulating notes heretofore issued: *Provided, however*, That each banking association which shall obtain the benefit of this act shall reimburse to the Treasury the cost of preparing the plate or plates for such new circulating notes as shall be issued to it.

§ 73. **Closing of Banks not adopting these Provisions.**[1] — SEC. 7. That national banking associations whose corporate existence has expired or shall hereafter expire, and which do not avail themselves of the provisions of this act, shall be required to comply with the provisions of sections fifty-two hundred and twenty-one and fifty-two hundred and twenty-two of the Revised Statutes in the same manner as if the shareholders had voted to go into liquidation, as provided in section fifty-two hundred and twenty of the Revised Statutes; and the provisions of sections fifty-two hundred and twenty-four and fifty-two hundred and twenty-five of the Revised Statutes shall also be applicable to such associations, except as modified by this act; and the franchise of such association is hereby extended for the sole purpose of liquidating their affairs until such affairs are finally closed.

§ 74. **Bonds not more than one fourth Capital. — Circulation not to exceed ninety per cent of Bonds. — Assessments for Redemption of Outstanding Notes.** — SEC. 8. That national banks now organized or hereafter organized, having a capital of one hundred and fifty thousand dollars, or less, shall not be required to keep on deposit or deposit with the Treasurer of the United States, United States bonds in excess of one fourth of their capital stock as security for their circulating notes; but

[1] R. S. 5220–5225.

such banks shall keep on deposit or deposit with the Treasurer of the United States, the amount of bonds as herein required. And such of those banks having on deposit bonds in excess of that amount are authorized to reduce their circulation by the deposit of lawful money as provided by law: *Provided*, That the amount of such circulating notes shall not in any case exceed ninety per centum of the par value of the bonds deposited as herein provided: *Provided further*, That the national banks which shall hereafter make deposits of lawful money for the retirement in full of their circulation shall at the time of their deposit be assessed, for the cost of transporting and redeeming their notes then outstanding, a sum equal to the average cost of the redemption of national bank notes during the preceding year, and shall thereupon pay such assessment. And all national banks which have heretofore made or shall hereafter make deposits of lawful money for the reduction of their circulation shall be assessed and shall pay an assessment in the manner specified in section three of the act approved June twentieth, eighteen hundred and seventy-four, for the cost of transporting and redeeming their notes redeemed from such deposits subsequently to June thirtieth, eighteen hundred and eighty-one.

§ 75. **Withdrawal or Increase of Circulation.** — SEC. 9. That any national banking association now organized, or hereafter organized, desiring to withdraw its circulating notes, upon a deposit of lawful money with the Treasurer of the United States, as provided in section four of the act of June twentieth, eighteen hundred and seventy-four, entitled, "An Act fixing the amount of United States notes, providing for a redistribution of national bank currency, and for other purposes," or as provided in this act, is authorized to deposit lawful money and withdraw a proportionate amount of the bonds held as security for its circulating notes in the order of such deposits; and no national bank which makes any deposit of lawful money in order to withdraw its circulating notes shall be entitled to receive any increase of its circulation for the period of six months from the time it made such deposit of lawful money for the purpose aforesaid: *Provided*, That not more

than three millions of dollars of lawful money shall be deposited during any calendar month for this purpose: *and provided further*, That the provisions of this section shall not apply to bonds called for redemption by the Secretary of the Treasury, nor to the withdrawal of circulating notes in consequence thereof.

§ 76. **Deposit of Bonds and Notes issued not to exceed ninety per cent of paid Capital.**[1] — SEC. 10. That upon a deposit of bonds as described by sections fifty-one hundred and fifty-nine and fifty-one hundred and sixty, except as modified by section four of an act entitled "An Act fixing the amount of United States notes, providing for a redistribution of the national bank currency, and for other purposes," approved June twentieth, eighteen hundred and seventy-four, and as modified by section eight of this act, the association making the same shall be entitled to receive from the Comptroller of the Currency circulating notes of different denominations, in blank, registered and countersigned as provided by law, equal in amount to ninety per centum of the current market value, not exceeding par, of the United States bonds so transferred and delivered, and at no time shall the total amount of such notes issued to any such association exceed ninety per centum of the amount at such time actually paid in of its capital stock; and the provisions of sections fifty-one hundred and seventy-one and fifty-one hundred and seventy-six of the Revised Statutes are hereby repealed.

§ 77. **Three and one half per cent Bonds exchanged for Three per cent Registered. — Tax Exemption.** — SEC. 11. That the Secretary of the Treasury is hereby authorized to receive at the Treasury any bonds of the United States bearing three and a half per centum interest, and to issue in exchange therefor an equal amount of registered bonds of the United States of the denominations of fifty, one hundred, five hundred, one thousand, and ten thousand dollars, of such form as he may prescribe, bearing interest at the rate of three per centum per annum, payable quarterly at the Treasury of the United

[1] R. S. 5159, 5160. R. S. 5171, 5176, repealed.

States. Such bonds shall be exempt from all taxation by or under State authority, and be payable at the pleasure of the United States: *Provided*, That the bonds herein authorized shall not be called in and paid so long as any bonds of the United States heretofore issued bearing a higher rate of interest than three per centum, and which shall be redeemable at the pleasure of the United States, shall be outstanding and uncalled. The last of the said bonds originally issued under this act, and their substitutes, shall be first called in, and this order of payment shall be followed until all shall have been paid.

§ 78. **Gold Certificates issued in Exchange for Coin until —. Such Certificates and Silver Certificates counted in the Reserve. No Bank to be a Member of a Clearing-House refusing Gold or Silver Certificates.**[1] — SEC. 12. That the Secretary of the Treasury is authorized and directed to receive deposits of gold coin with the Treasurer or assistant treasurers of the United States, in sums not less than twenty dollars, and to issue certificates therefor in denominations of not less than twenty dollars each, corresponding with the denominations of United States notes. The coin deposited for or representing the certificates of deposit shall be retained in the Treasury for the payment of the same on demand. Said certificates shall be receivable for customs, taxes, and all public dues, and when so received may be reissued; and such certificates, as also silver certificates, when held by any national banking association, shall be counted as part of its lawful reserve; and no national banking association shall be a member of any clearing-house in which such certificates shall not be receivable in the settlement of clearing-house balances: *Provided*, That the Secretary of the Treasury shall suspend the issue of such gold certificates whenever the amount of gold coin and gold bullion in the Treasury reserved for the redemption of United States notes falls below one hundred millions of dollars; and the provisions of section fifty-two hundred and seven of the Revised Statutes shall be applicable to the certificates herein authorized and directed to be issued.

[1] R. S. 5207.

§ 79. **Penalty for False Certification.**[1] — SEC. 13. That any officer, clerk, or agent of any national banking association who shall wilfully violate the provisions of an act entitled "An Act in reference to certifying checks by national banks," approved March third, eighteen hundred and sixty-nine, being section fifty-two hundred and eight of the Revised Statutes of the United States, or who shall resort to any device, or receive any fictitious obligation, direct or collateral, in order to evade the provisions thereof, or who shall certify checks before the amount thereof shall have been regularly entered to the credit of the dealer upon the books of the banking association, shall be deemed guilty of a misdemeanor, and shall, on conviction thereof in any Circuit or District Court of the United States, be fined not more than five thousand dollars, or shall be imprisoned not more than five years, or both, in the discretion of the court.

SEC. 14. That Congress may at any time amend, alter, or repeal this act and the acts of which this is amendatory.

§ 80. An Act to reduce Internal Revenue Taxation, and for other Purposes.[2]

Taxes repealed. — *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That the taxes herein specified, imposed by the laws now in force, be, and the same are hereby, repealed as hereinafter provided, namely: *on capital and deposits of banks, bankers, and national banking associations*, except such taxes as are now due and payable: and on and after the first day of July, eighteen hundred and eighty-three, the stamp tax on *bank checks, drafts, orders*, and *vouchers*, &c.

[1] R. S. 5208.

[2] March 3, 1883. Chap. 121.

§ 81. **An Act to enable National Banking Associations to increase their Capital Stock, and to change their Names or Locations.**[1]

Increase of Capital. — Change of Name or Location. — *Be it enacted by the Senate and House of Representatives of the United States of America in Congress Assembled*, That any national banking association may, with the approval of the Comptroller of the Currency, by the vote of shareholders owning two thirds of the stock of such association, increase its capital stock, in accordance with existing laws, to any sum approved by the said Comptroller, notwithstanding the limit fixed in its original articles of association, and determined by said Comptroller; and no increase of the capital stock of any national banking association, either within or beyond the limit fixed in its original articles of association shall be made except in the manner herein provided.

Sec. 2. That any national banking association may change its name, or the place where its operations of discount and deposit are to be carried on, to any other place within the same State, not more than thirty miles distant, with the approval of the Comptroller of the Currency, by the vote of shareholders owning two thirds of the stock of such association. A duly authenticated notice of the vote, and of the new name or location selected, shall be sent to the office of the Comptroller of the Currency; but no change of name or location shall be valid until the Comptroller shall have issued his certificate of approval of the same.

Sec. 3. That all debts, liabilities, rights, provisions, and powers of the association under its old name shall devolve upon and inure to the association under its new name.

Sec. 4. That nothing in this act shall be so construed as in any manner to release any national banking association under its old name, or at its old location, from any liability, or affect any action or proceeding in law in which said association may be, or become, a party interested.

[1] May 1, 1886. Chap. 73.

§ 82. **An Act to amend the Act of Congress approved March third, eighteen hundred and seventy-five, entitled, "An Act to determine the Jurisdiction of Circuit Courts of the United States, and to regulate the Removal of Causes from State Courts, and for other Purposes, and to further regulate the Jurisdiction of Circuit Courts of the United States, and for other Purposes."** [1]

Jurisdiction. — SEC. 4. That all national banking associations established under the laws of the United States shall, for the purposes of all actions by or against them, real, personal, or mixed, and all suits in equity, be deemed citizens of the States in which they are respectively located; and in such cases the Circuit and District Courts shall not have jurisdiction other than such as they would have in cases between individual citizens of the same State.

The provisions of this section shall not be held to affect the jurisdiction of the courts of the United States in cases commenced by the United States, or by direction of any officer thereof, or cases for winding up the affairs of any such bank.

§ 83. **An Act to amend Sections five thousand one hundred and ninety-one and five thousand one hundred and ninety-two of the Revised Statutes of the United States, and for other Purposes.** [2]

"Reserve" and "Central Reserve" Cities. — *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That, whenever three fourths in number of the national banks located in any city of the United States having a population of fifty thousand people shall make application to the Comptroller of the Currency in writing, asking that the name of the city in which such banks are located, shall be added to the cities named in sections fifty-one hundred and ninety-one and fifty-one hundred and ninety-two of the Revised Statutes, the Comptroller shall have

[1] March 3, 1887. Chap. 373. See §§ 57 and 70.
[2] March 3, 1887. Chap. 378. R. S. 5191, 5192, 5195.

authority to grant such request, and every bank located in such city shall at all times thereafter have on hand, in lawful money of the United States, an amount equal to at least twenty-five per centum of its deposits, as provided in section fifty-one hundred and ninety-one and fifty-one hundred and ninety-five of the Revised Statutes.

SEC. 2. That whenever three fourths in number of the national banks located in any city of the United States having a population of two hundred thousand people shall make application to the Comptroller of the Currency, in writing, asking that such city may be a "central reserve" city, like the city of New York, in which one half of the lawful money reserve of the national banks located in other reserve cities may be deposited, as provided in section fifty-one hundred and ninety-five of the Revised Statutes, the Comptroller shall have authority, with the approval of the Secretary of the Treasury, to grant such request, and every bank located in such city shall, at all times thereafter, have on hand, in lawful money of the United States, twenty-five per centum of its deposits, as provided in section fifty-one hundred and ninety-one of the Revised Statutes.

SEC. 3. That section three of the act of January fourteenth, eighteen hundred and seventy-five, entitled "An Act to provide for the resumption of specie payments," be, and the same is hereby, amended by adding after the words "New York," the words "and the city of San Francisco, California."

§ 84. FULL TEXT OF THE LAWS OF THE UNITED STATES RELATING TO BANKING PASSED IN 1874, 1875, AND 1876,

WHICH, ALTHOUGH NOTED IN THE REVISED STATUTES OF 1878, ARE NOT FULLY INCORPORATED THEREIN, BUT ARE STILL THE FINAL EVIDENCE OF THE LAW, AND IN CASE OF DISCREPANCY CONTROL THE REVISED STATUTES OF 1878.

(*a*) **An Act fixing the Amount of United States Notes, providing for a Re-distribution of National Bank Currency, and for other Purposes.**

SEC. 1. *Be it enacted, &c.*, That the act entitled "An Act to provide a national currency secured by a pledge of United States bonds, and to provide for the circulation and redemption thereof," approved June third, eighteen hundred and sixty-four, shall hereafter be known as the "National Bank Act."

SEC. 2. That section thirty-one of the National Bank Act be so amended that the several associations therein provided for shall not hereafter be required to keep on hand any amount of money whatever by reason of the amount of their respective circulations; but the moneys required by said section to be kept at all times on hand shall be determined by the amount of deposits in all respects as provided for in the said section.

SEC. 3. That every association organized, or to be organized, under the provisions of the said act, and of the several acts amendatory thereof, shall at all times keep and have on deposit in the Treasury of the United States, in lawful money of the United States, a sum equal to five per centum of its circulation, to be held and used for the redemption of such circulation; which sum shall be counted as a part of its lawful reserve, as provided in section two of this act; and when the circulating notes of any such associations, assorted or unassorted, shall be presented for redemption, in sums of one thousand dollars or any multiple thereof, to the Treasurer of the United States, the same shall be redeemed in United States notes. All notes so redeemed shall be charged by the Treasurer of the United States to the respective associations issuing the same, and he shall notify them severally, on the first day

of each month, or oftener, at his discretion, of the amount of such redemptions; and whenever such redemptions for any association shall amount to the sum of five hundred dollars, such association so notified shall forthwith deposit with the Treasurer of the United States a sum in United States notes equal to the amount of its circulating notes so redeemed. And all notes of national banks, worn, defaced, mutilated, or otherwise unfit for circulation, shall, when received by any Assistant Treasurer, or at any designated depository of the United States, be forwarded to the Treasurer of the United States for redemption, as provided herein. And when such redemptions have been so reimbursed, the circulating notes so redeemed shall be forwarded to the respective associations by which they were issued; but if any of such notes are worn, mutilated, defaced, or rendered otherwise unfit for use, they shall be forwarded to the Comptroller of the Currency and destroyed, and replaced as now provided by law: *Provided*, That each of said associations shall reimburse to the Treasury the charges for transportation and the cost for assorting such notes; and the associations hereafter organized shall also severally reimburse to the Treasury the cost of engraving such plates as shall be ordered by each association respectively; and the amount assessed upon each association shall be in proportion to the circulation redeemed, and be charged to the fund on deposit with the Treasurer: *and provided, further*, That so much of section thirty-two of said National Bank Act requiring or permitting the redemption of its circulating notes elsewhere than at its own counter, except as provided for in this section, is hereby repealed.

Sec. 4. That any association organized under this act, or any of the acts of which this is an amendment, desiring to withdraw its circulating notes, in whole or in part, may, upon the deposit of lawful money with the Treasurer of the United States in sums of not less than nine thousand dollars, take up the bonds which said association has on deposit with the Treasurer for the security of such circulating notes, which bonds shall be assigned to the bank in the manner specified in the nineteenth section of the National Bank Act; and the out-

standing notes of said association, to an amount equal to the legal tender notes deposited, shall be redeemed at the Treasury of the United States, and destroyed as now provided by law: *Provided*, That the amount of the bonds on deposit for circulation shall not be reduced below fifty thousand dollars.

SEC. 5. That the Comptroller of the Currency shall, under such rules and regulations as the Secretary of the Treasury may prescribe, cause the charter numbers of the association to be printed upon all national bank notes which may be hereafter issued by him.

SEC. 6. That the amount of United States notes outstanding and to be used as a part of the circulating medium shall not exceed the sum of three hundred and eighty-two million dollars, which said sum shall appear in each monthly statement of the public debt, and no part thereof shall be held or used as a reserve.

SEC. 7. That so much of the act entitled "An Act to provide for the redemption of the three per cent temporary loan certificates, and for an increase of national bank notes," as provides that no circulation shall be withdrawn under the provisions of section six of said act, until after the fifty-four millions granted in section one of said act shall have been taken up, is hereby repealed; and it shall be the duty of the Comptroller of the Currency, under the direction of the Secretary of the Treasury, to proceed forthwith, and he is hereby authorized, and required, from time to time, as applications shall be duly made therefor, and until the full amount of fifty-five million dollars shall be withdrawn, to make requisitions upon each of the national banks described in said section, and in the manner therein provided, organized in States having an excess of circulation, to withdraw and return so much of their circulation as by said act may be apportioned to be withdrawn from them, or, in lieu thereof, to deposit in the Treasury of the United States lawful money sufficient to redeem such circulation; and upon the return of the circulation required, or the deposit of lawful money, as herein provided, a proportionate amount of the bonds held to secure the circulation of such

association as shall make such return or deposit shall be surrendered to it.

SEC. 8. That upon the failure of the national banks upon which requisition for circulation shall be made, or of any of them, to return the amount required, or to deposit in the Treasury lawful money to redeem the circulation required, within thirty days, the Comptroller of the Currency shall at once sell, as provided in section forty-nine of the National Currency Act, approved June third, eighteen hundred and sixty-four, bonds held to secure the redemption of the circulation of the association or associations which shall so fail, to an amount sufficient to redeem the circulation required of such association or associations, and with the proceeds, which shall be deposited in the Treasury of the United States, so much of the circulation of such association or associations shall be redeemed as will equal the amount required and not returned; and, if there be an excess of proceeds over the amount required for such redemption, it shall be returned to the association or associations whose bonds shall have been sold. And it shall be the duty of the Treasurer, Assistant Treasurers, designated depositaries, and national bank depositaries of the United States, who shall be kept informed by the Comptroller of the Currency of such associations as shall fail to return circulation as required, to assort and return to the Treasury for redemption the notes of such associations as shall come into their hands until the amount required shall be redeemed, and in like manner to assort and return to the Treasury, for redemption, the notes of such national banks as have failed or gone into voluntary liquidation for the purpose of winding up their affairs, and of such as shall hereafter so fail or go into liquidation.

SEC. 9. That from and after the passage of this act it shall be lawful for the Comptroller of the Currency, and he is hereby required, to issue circulating notes, without delay, as applications therefor are made, not to exceed the sum of fifty-five million dollars, to associations organized or to be organized in those States and Territories having less than their proportion of circulation, under an apportionment made on the basis

of population and of wealth as shown by the returns of the census of eighteen hundred and seventy; and every association hereafter organized shall be subject to, and be governed by, the rules, restrictions, and limitations, and possess the rights, privileges, and franchises, now or hereafter to be prescribed by law as to national banking associations, with the same power to amend, alter, and repeal provided by the National Banking Act; *Provided*, That the whole amount of circulation withdrawn and redeemed from banks transacting business shall not exceed fifty-five million dollars, and that such circulation shall be withdrawn and redeemed as it shall be necessary to supply the circulation previously issued to the banks in those States having less than their apportionment: *and provided, further*, That not more than thirty million dollars shall be withdrawn and redeemed as herein contemplated during the fiscal year ending June thirtieth, eighteen hundred and seventy-five.

Approved June 20, 1874.

(*b*) **An Act to provide for the Resumption of Specie Payments.**

Be it enacted, &c., That the Secretary of the Treasury is hereby authorized and required, as rapidly as practicable, to cause to be coined, at the mints of the United States, silver coins of the denominations of ten, twenty-five, and fifty cents, of standard value, and to issue them in redemption of an equal number and amount of fractional currency of similar denominations, or, at his discretion, he may issue such silver coins through the mints, the sub-treasuries, public depositories, and post-offices of the United States; and, upon such issue, he is hereby authorized and required to redeem an equal amount of such fractional currency, until the whole amount of such fractional currency outstanding shall be redeemed.

SEC. 2. That so much of section three thousand five hundred and twenty-four of the Revised Statutes of the United States as provides for a charge of one fifth of one per centum for converting standard gold bullion into coin is hereby repealed; and hereafter no charge shall be made for that service.

SEC. 3. That section five thousand one hundred and seventy-seven of the Revised Statutes, limiting the aggregate amount of circulating notes of national banking associations, be, and is hereby, repealed; and each existing banking association may increase its circulating notes in accordance with existing law without respect to said aggregate limit; and new banking associations may be organized in accordance with existing law without respect to said aggregate limit; and the provisions of law for the withdrawal and redistribution of national bank currency among the several States and Territories are hereby repealed. And whenever, and so often, as circulating notes shall be issued to any such banking association, so increasing its capital or circulating notes, or so newly organized as aforesaid, it shall be the duty of the Secretary of the Treasury to redeem the legal tender United States notes in excess only of three hundred million of dollars, to the amount of eighty per centum of the sum of national bank notes so issued to any such banking association as aforesaid, and to continue such redemption as such circulating notes are issued until there shall be outstanding the sum of three hundred million dollars of such legal tender United States notes, and no more. And on and after the first day of January, anno Domini eighteen hundred and seventy-nine, the Secretary of the Treasury shall redeem, in coin, the United States legal tender notes then outstanding, on their presentation for redemption at the office of the Assistant Treasurer of the United States in the city of New York, in sums of not less than fifty dollars. And to enable the Secretary of the Treasury to prepare and provide for the redemption in this act authorized or required, he is authorized to use any surplus revenues, from time to time, in the Treasury, not otherwise appropriated, and to issue, sell, and dispose of, at not less than par, in coin, either of the descriptions of bonds of the United States described in the act of Congress approved July fourteenth, eighteen hundred and seventy, entitled "An Act to authorize the refunding of the national debt," with like qualities, privileges, and exemptions, to the extent necessary to carry this act into full effect, and to use the proceeds thereof for the purposes

aforesaid. And all provisions of law inconsistent with the provisions of this act are hereby repealed.

Approved January 14, 1875.

(*c*) **An Act to remove the Limitation restricting the Circulation of Banking Associations issuing Notes payable in Gold.**

Be it enacted, &c., That so much of section five thousand one hundred and eighty-five of the Revised Statutes of the United States as limits the circulation of banking associations, organized for the purpose of issuing notes payable in gold, severally to one million dollars, be, and the same is hereby, repealed; and each of such existing banking associations may increase its circulating notes, and new banking associations may be organized, in accordance with existing law, without respect to such limitation.

Approved January 19, 1875.

(*d*) **An Act to amend existing Customs and Internal Revenue Laws, and for other Purposes.**

SEC. 15. *Be it enacted, &c.*, That the words "bank check, draft, or order for the payment of any sum of money whatsoever, drawn upon any bank, banker, or trust company, at sight or on demand, two cents," in Schedule B of the act of June thirtieth, eighteen hundred and sixty-four, be, and the same are hereby, stricken out, and the following paragraph inserted in lieu thereof:

"Bank check, draft, order, or voucher for the payment of any sum of money whatsoever, drawn upon any bank, banker, or trust company, two cents."

SEC. 19. That every person, firm, association other than national bank associations, and every corporation, State bank, or State banking association, shall pay a tax of ten per centum on the amount of their own notes used for circulation and paid out by them.

SEC. 20. That every such person, firm, association, corporation, State bank, or State banking association, and also every national banking association, shall pay a like tax of ten per centum on the amount of notes of any person, firm, asso-

ciation other than a national banking association, or of any corporation, State bank, or State banking association, or of any town, city, or municipal corporation, used for circulation and paid out by them.

SEC. 21. That the amount of such circulating notes, and of the tax due thereon, shall be returned, and the tax paid at the same time, and in the same manner, and with like penalties for failure to return and pay the same, as provided by law for the return and payment of taxes on deposits, capital, and circulation, imposed by the existing provisions of internal revenue law.

Approved February 8, 1875.

(*e*) Extract from an Act to correct Errors and to supply Omissions in the Revised Statutes of the United States.

Be it enacted, That for the purpose of correcting errors and supplying omissions in the act entitled "An Act to revise and consolidate the statutes of the United States in force on the first day of December, anno Domini one thousand eight hundred and seventy-three," so as to make the same truly express such laws, the following amendments are hereby made therein: . . . .

Section three hundred and thirty is amended by adding thereto the following: "A description of the seal, with an impression thereof, and a certificate of approval by the Secretary of the Treasury, shall be filed in the office of the Secretary of State."

Section three hundred and thirty-three is amended by inserting after the word "Congress," in the second line, the words "at the commencement of its session."

Section six hundred and twenty-nine is amended by striking out, in the first line of paragraph eleven, the words "or against."

Section three thousand four hundred and seventeen is amended by inserting in the fourth line, after the word "twelve," the words "thirty-four hundred and thirteen."

Section three thousand eight hundred and eleven is amended by striking out "Secretary of the Treasury," and inserting

"Comptroller of the Currency"; also, by adding, after the word "banks," in the second line, the words "and banks under State and Territorial laws."

Section five thousand one hundred and eighty-three is amended by inserting, after the word "issue," in the second line, the words "post notes or."

Section five thousand one hundred and ninety-eight is amended by adding thereto the following: "That suits, actions, and proceedings against any association under this Title may be had in any Circuit, District, or Territorial court of the United States held within the district in which such association may be established, or in any State, county, or municipal court in the county or city in which said association is located having jurisdiction in similar cases."

Section five thousand two hundred and twenty-four is amended by adding thereto the following: "And if any such bank shall fail to make the deposit and take up its bonds for thirty days after the expiration of the time specified, the Comptroller of the Currency shall have power to sell the bonds pledged for the circulation of said bank, at public auction in New York City, and, after providing for the redemption and cancellation of said circulation and the necessary expenses of the sale, to pay over any balance remaining to the bank or its legal representative."

Section five thousand two hundred and twenty-eight is amended by striking out in the third line the words "of forfeiture of the bonds," and inserting the word "thereof."

Section five thousand four hundred and thirteen is amended by inserting in the third line, after the word "national," the word "bank."

Approved February 18, 1875.

(*f*) **An Act to amend Section five thousand two hundred and forty of the Revised Statutes of the United States relating to Compensation of National Bank Examiners.**

Be it enacted, That section five thousand two hundred and forty of the Revised Statutes of the United States be so amended that the latter clause of said section, after the word

"Comptroller" in the eighth line of said section [*the tenth line of this work*], be amended so that the same shall read as follows, namely: "That all persons appointed to be examiners of national banks not located in the redemption cities specified in section five thousand one hundred and ninety-two of the Revised Statutes of the United States, or in any one of the States of Oregon, California, and Nevada, or in the Territories, shall receive compensation for such examination as follows: For examining national banks having a capital less than one hundred thousand dollars, twenty dollars; those having a capital of one hundred thousand dollars and less than three hundred thousand dollars, twenty-five dollars; those having a capital of three hundred thousand dollars and less than four hundred thousand dollars, thirty-five dollars; those having a capital of four hundred thousand dollars and less than five hundred thousand dollars, forty dollars; those having a capital of five hundred thousand dollars and less than six hundred thousand dollars, fifty dollars; those having a capital of six hundred thousand dollars and over, seventy-five dollars; which amounts shall be assessed by the Comptroller of the Currency upon, and paid by, the respective associations so examined, and shall be in lieu of the compensation and mileage heretofore allowed for making said examinations; and persons appointed to make examination of national banks in the cities named in section five thousand one hundred and ninety-two of the Revised Statutes of the United States, or in any one of the States of Oregon, California, and Nevada, or in the Territories, shall receive such compensation as may be fixed by the Secretary of the Treasury upon the recommendation of the Comptroller of the Currency: and the same shall be assessed and paid in the manner hereinbefore provided."

Approved February 19, 1875.

(*g*) An Act authorizing the Appointment of Receivers of National Banks, and for other Purposes.

Be it enacted, That whenever any national banking association shall be dissolved, and its rights, privileges, and franchises declared forfeited, as prescribed in section fifty-two

hundred and thirty-nine of the Revised Statutes of the United States, or whenever any creditor of any national banking association shall have obtained a judgment against it in any court of record, and made application, accompanied by a certificate from the clerk of the court, stating that such judgment has been rendered and has remained unpaid for the space of thirty days, or whenever the Comptroller shall become satisfied of the insolvency of a national banking association, he may, after due examination of its affairs, in either case, appoint a receiver, who shall proceed to close up such association, and enforce the personal liability of the shareholders, as provided in section fifty-two hundred and thirty-four of said statutes.

SEC. 2. That when any national banking association shall have gone into liquidation under the provisions of section five thousand two hundred and twenty of said statutes, the individual liability of the shareholders provided for by section fifty-one hundred and fifty-one of said statutes may be enforced by any creditor of such association, by bill in equity in the nature of a creditor's bill, brought by such creditor on behalf of himself and of all other creditors of the association, against the shareholders thereof, in any court of the United States having original jurisdiction in equity for the district in which such association may have been located or established.

SEC. 3. That whenever any association shall have been or shall be placed in the hands of a receiver, as provided in section fifty-two hundred and thirty-four and other sections of said statutes, and when, as provided in section fifty-two hundred and thirty-six thereof, the Comptroller shall have paid to each and every creditor of such association, not including shareholders who are creditors of such association, whose claim or claims as such creditor shall have been proved, or allowed as therein prescribed, the full amount of such claims and all expenses of the receivership, and the redemption of the circulating notes of such association shall have been provided for by depositing lawful money of the United States with the Treasurer of the United States, the Comptroller of the Currency shall call a meeting of the shareholders of such association by giving notice thereof for thirty days in a newspaper published

in the town, city, or county where the business of such association was carried on, or if no newspaper is there published, in the newspaper published nearest thereto, at which meeting the shareholders shall elect an agent, voting by ballot, in person or by proxy, each share of stock entitling the holder to one vote; and when such agent shall have received votes representing at least a majority of the stock in value and number of shares, and when any of the shareholders of the association shall have executed and filed a bond to the satisfaction of the Comptroller of the Currency, conditioned for the payment and discharge in full of any and every claim that may hereafter be proved and allowed against such association by and before a competent court, and for the faithful performance and discharge of all and singular the duties of such trust, the Comptroller and the receiver shall thereupon transfer and deliver to such agent all the undivided or uncollected or other assets and property of such association then remaining in the hands or subject to the order or control of said Comptroller and said receiver, or either of them; and for this purpose, said Comptroller and said receiver are hereby severally empowered to execute any deed, assignment, transfer, or other instrument in writing that may be necessary and proper; whereupon the said Comptroller and the said receiver shall, by virtue of this act, be discharged and released from any and all liabilities to such association, and to each and all of the creditors and shareholders thereof; and such agent is hereby authorized to sell, compromise, or compound the debts due to such association upon the order of a competent court of record or of the United States Circuit Court for the district where the business of the association was carried on. Such agent shall hold, control, and dispose of the assets and property of any association which he may receive as hereinbefore provided for the benefit of the shareholders of such association as they, or a majority of them in value or number of shares, may direct, distributing such assets and property among such shareholders in proportion to the shares held by each; and he may in his own name, or in the name of such association, sue and be sued, and do all other lawful acts and things necessary to finally

settle and distribute the assets and property in his hands. In selecting an agent as hereinbefore provided, administrators or executors of deceased shareholders may act and sign as the decedent might have done if living, and guardians may so act and sign for their ward or wards.

SEC. 4. That the last clause of section fifty-two hundred and five of said statutes is hereby amended by adding to the said section the following proviso:

"*And provided*, That if any shareholder or shareholders of such bank shall neglect or refuse, after three months' notice, to pay the assessment, as provided in this section, it shall be the duty of the board of directors to cause a sufficient amount of the capital stock of such shareholder or shareholders to be sold at public auction (after thirty days' notice shall be given by posting such notice of sale in the office of the bank, and by publishing such notice in a newspaper of the city or town in which the bank is located, or in a newspaper published nearest thereto) to make good the deficiency; and the balance, if any, shall be returned to such delinquent shareholder or shareholders."

SEC. 5. That all United States officers charged with the receipt or disbursement of public moneys, and all officers of national banks, shall stamp or write in plain letters the word "counterfeit," "altered," or "worthless," upon all fraudulent notes issued in the form of, and intended to circulate as money, which shall be presented at their places of business; and if such officers shall wrongfully stamp any genuine note of the United States, or of the national banks, they shall, upon presentation, redeem such notes at the face value thereof.

SEC. 6. That all savings banks or savings and trust companies organized under authority of any act of Congress shall be, and are hereby, required to make to the Comptroller of the Currency, and publish, all the reports which national banking associations are required to make and publish under the provisions of sections fifty-two hundred and eleven, fifty-two hundred and twelve, and fifty-two hundred and thirteen of the Revised Statutes, and shall be subject to the same penalties for failure to make or publish such reports as are therein pro-

vided; which penalties may be collected by suit before any court of the United States in the district in which said savings banks or savings and trust companies may be located. And all savings or other banks now organized, or which shall hereafter be organized, in the District of Columbia, under any act of Congress, which shall have capital stock paid up in whole or in part, shall be subject to all the provisions of the Revised Statutes, and of all acts of Congress applicable to national banking associations, so far as the same may be applicable to such savings or other banks: *Provided*, that such savings banks now established shall not be required to have a paid-in capital exceeding one hundred thousand dollars.

Approved June 30, 1876.

CASES.

[The decisions which have been rendered in construing the provisions of the national banking acts are naturally disconnected in character, and are constantly at variance with each other. It has therefore been deemed best to give them in the shape of a digest.]

§ 100. **National Banks are Instruments of the National Government.** — It has been said, generally, concerning the national banking associations, organized under the acts of Congress of 1863 and 1864, that these banks "are instruments designed to be used to aid the government in the administration of an important branch of the public service. They are means appropriate to that end. Of the degree of the necessity which existed for creating them, Congress is the sole judge. Being such means, brought into existence for this purpose, and intended to be so employed, the States can exercise no control over them, nor in any wise affect their operation, except in so far as Congress may see proper to permit." Anything beyond this is "an abuse, because it is the usurpation of power which a single State cannot give." Against the national will, "the States have no power, by taxation or otherwise, to retard, impede, burden, or in any manner

control, the operation of the constitutional laws enacted by Congress to carry into execution the powers invested in the general government." [1]

Where by State statute the establishment of banking companies without legislative authority is prohibited, such provision does not apply to national banks, which are created by act of Congress, and are independent of State legislation.[2]

(*a*) **Consequent Presumptions of Knowledge, inter sese.** — Inasmuch as all the national banks are organized under precisely the same statutes, and are regulated and governed in every respect by the same enactments, it has been held that in all dealings between such associations the officers and agents of each must be assumed to be familiar with the corporate powers of the other, and with the general powers and duties of the several officers of the other.[3]

§ 101. **The Comptroller.**[1] — (*a*) The Comptroller can remove a receiver appointed by him.[2] His certificate, approved by the Secretary of the Treasury, reciting the existence of the facts necessary to give him power to appoint a receiver, is sufficient evidence of the receiver's appointment in an action brought by him.[3]

(*b*) It is doubtful whether it is within the competency of the Comptroller to submit himself, in the exercise of duties specially confided to him by acts of Congress, to the control of the courts, and especially of those which can assert no such jurisdiction by reason of their territorial limits. But he has no authority to subject the United States to such jurisdiction, and to submit the rights of the government to litigation in any court, without some provision of law authorizing him to do so. Where the liability of the United States for demands is denied, or payment refused, the Court of Claims has juris-

[1] § 100. Farmers & Mechanics' National Bank *v.* Dearing, 91 U. S. (1 Otto,) 29; and see Veazie Bank *v.* Fenno, 8 Wall. 533.

[2] Stetson *v.* City of Bangor, 56 Me. 274.

[3] First National Bank *v.* Ocean National Bank, 60 N. Y. 278.

[1] § 101. R. S. 324–333. See §§ 1, 2, 3, 106 *a*.

[2] Cadle *v.* Baker, 20 Wall. 650.

[3] Platt *v.* Beebe, 57 N. Y. 339; Merchants *v.* Cardoza, 3 Jones & S. 162.

diction, and no other court has. The United States cannot be subjected to litigation growing out of its relations to national banks in all the various courts in which their affairs may be the subject of judicial controversy.[4]

§ 102. **Evidence, Comptroller.**[1] — A copy of the certificate of organization of a national bank, certified by the Comptroller and authenticated by his seal, is competent evidence in a State court.[2]

§ 106. **Organization Certificate.**[1] — Until the "organization certificate" has been made in compliance with the requirements of section 6, there can be no legal organization of the association. Persons who fail to unite in such certificate, by setting their signatures thereto, are not members of the association.[2]

A national bank is a citizen of the State in which by law it is located. The designation of its place of business in the certificate of organization determines its locality, and it can have no other.[3]

(*a*) **Allegation, Denial, and Proof of Corporate Character. — The Comptroller's Certificate.**[4] — That the plaintiff, suing in the corporate character of a national banking association, existing and organized under and by virtue of the act of Congress, is not legally such, and therefore is not entitled to maintain a suit as such, by reason of having failed to comply with the exact requirements of the act, is a matter which the defendant may fairly plead. But it cannot be tried by affidavit, on motion.[5]

On the other hand, however, it has been very properly held that it is for the Comptroller of the Currency to decide whether

[4] Case *v.* Terrell, 11 Wall. 199.

[1] § 102. R. S. 884. See §§ 2, 6, 101, 106 *a*.

[2] Tapley *v.* Martin, 116 Mass. 275; First National Bank *v.* Kidd, 20 Minn. 234.

[1] § 106. R. S. 5134. See §§ 6, 102, 106 *a*.

[2] Burrows *v.* Smith, 10 N. Y. 550.

[3] Cooke *v.* State National Bank, 52 N. Y. 96; Chatham National Bank *v.* Merchants' National Bank, 4 Thomp. & C. 196.

[4] R. S. 5134, 5169, 5170. See §§ 6, 12, 101, 102.

[5] National Bank of the Metropolis *v.* Orcutt, 48 Barb. 256.

a national bank has complied with the act of Congress before he issues his certificate, and that his decision is not subject to the revision of a State court. Therefore, after the certificate has passed through the hands of the Comptroller, no objection can be taken to the fact that the organization certificate was acknowledged before a notary, who was at the same time a stockholder in the association.[6]

A copy of the certificate of organization of a national banking association, certified by the Comptroller of the Currency, is properly admitted in evidence by a State court, under section 6 of the act of 1864, and would be so independently of this legislation, since such certificates, when filed, are a part of the public records, and may be proved by duly authenticated copies.[7]

Plaintiff, organized under act of 1864, ch. 106, was described in the writ as "a corporate body organized under the laws of the United States of America, and having an established place of business at Bangor in the State of Maine." At the trial, the plaintiff, in proof of its corporate existence and organization, offered a certificate under the hand and seal of the Comptroller of the Currency, setting forth that it had been made to appear that "the Merchants' National Bank of Bangor, in the city of Bangor, in the county of Penobscot and State of Maine," had been duly organized, and certifying that it was duly authorized to commence business under the act of 1864. The book-keeper in a bank in Boston, Massachusetts, testified that he knew that the plaintiff did a banking business under the aforesaid name; that he had recently been in their banking-house in Bangor, and was well acquainted with their cashier, and that his own bank was in the habit of receiving remittances from the plaintiff bank. Defendant objected to all the foregoing testimony; but the court admitted it as being competent to show that plaintiff was *de facto* a banking corporation, and transacting business as such.[8]

[6] Thatcher *v.* West River National Bank, 19 Mich. 196.

[7] Tapley *v.* Martin, 116 Mass. 275. See U. S. Rev. Stat. § 885.

[8] Merchants' National Bank of Bangor *v.* Glendon Co., 120 Mass. 57.

Where the corporate existence of a national bank was a point in issue in an action by the bank against the maker of a promissory note, the fact that the bank was mentioned as the place of payment was ruled not to be conclusive evidence that the bank was a corporation.[9]

In another case in which the same issue was raised, the court said that, where "the party attempting to raise such an issue has accepted as payee a promissory note made payable at a banking institution which the parties to the note style a national bank, and has sold and transferred said note to said banking institution, he cannot be allowed to raise the issue by merely averring want of knowledge or information sufficient to form a belief as to whether the institution is a body corporate, organized and doing business under the act of Congress.[10]

Beyond this, it has also been said that a person who has been accustomed to deal with a national banking association as such is thereafter estopped to deny its corporate character.[11]

The certificate of the Comptroller, as to the organization of the bank, is conclusive in suits against either stockholders or creditors. Such certificate is also competent evidence as to the name of the corporation.[12]

A party who as payee has accepted a promissory note payable at a banking institution which the parties to the note style a national bank, and has sold and transferred the note to such banking institution, will not be allowed to put in issue the organization thereof under the national banking law by merely averring want of knowledge sufficient to form a belief whether the institution is a body corporate.[13]

[9] Hungerford National Bank *v.* Van Nostrand, 106 Mass. 559.

[10] Lindsay, C. J., Huffaker *v.* National Bank of Monticello, 12 Bush, 287.

[11] National Bank of Fairhaven *v.* Phœnix Warehousing Co , 6 Hun, 71.

[12] Thatcher *v.* West River National Bank, 19 Mich. 196; Washington County National Bank *v.* Lee, 112 Mass. 521.

[13] Huffaker *v.* National Bank of Monticello, 12 Bush, 287.

§ 108. Powers of a National Bank.

Synopsis. See I. § 47 *et seq.*
Incidental powers. § 108.
Right to deal in stocks and bonds. § 108 *a*.
Right to deal in United States government bonds. § 108 *b*.
Right to hold security for others. § 108 *c*.
Cashier's term of office. § 108 *d*.
Illegal security. § 108 *e*.
Pledges of personal property to bank. § 108 *f*.
Place of transacting business. § 108 *g*.

Incidental Powers.[1] — In the act of 1864, section 8, the words "by discounting promissory notes," &c., do not limit the modes of exercising the incidental powers granted, but limit and define the kind of banking which is authorized by the act. That is to say, the bank is authorized to carry on "banking by discounting and negotiating promissory notes," &c., and to exercise "all such incidental powers as shall be necessary" for that purpose.[2]

This section has been said to embody five distinct grants of power, no one of which operates as a limitation upon any other.[3]

(*a*) **The Right of a National Bank to deal in Stocks and Bonds.** — Under section 8 of the act of 1864 the authority to "exercise under this act all such incidental powers as shall be necessary to carry on the business of banking," &c., is limited to the exercise of such powers as are incidental to the specific functions which the section proceeds to set forth. Thus, the section names "exchange, coin, and bullion" as things which the bank may buy and sell, but it does not name stocks and bonds. The power to buy and sell stocks and bonds is not expressly given, and is not incidental to any of the functions named. It does not, therefore, inhere in the bank, and such transactions are *ultra vires* and illegitimate.[4]

[1] § 108. R. S. 5136, 5190. See § 8.

[2] Shinkle *v.* First National Bank of Ripley, 22 Ohio St. 516.

[3] Shoemaker *v.* National Mechanics' Bank, 2 Abb. (U. S.) 416.

[4] Weckler *v.* First National Bank of Hagerstown, 42 Md. 581; First National Bank of Charlotte *v.* National Exchange Bank of Baltimore, 39 Md. 600.

But where the circumstances show the bank to have come into possession of such shares in compromising a claim, and for the purpose of averting an apprehended loss growing out of a legitimate dealing, the transaction will be upheld as lawful.[5]

A national bank may receive stocks and bonds as collateral security for contemporaneous and future advances, this being a transaction incident to the usual course of banking business. The bank assumes, upon the receipt of such bonds, the position of an ordinary bailee, and in case the bonds are stolen the bank will be responsible if there shall appear to have been an absence of proper and sufficient care on its part. The measure of damages will be the value of the bonds at the time when they were stolen.[6]

A national bank, which had accepted and caused to be transferred to it shares of stock of another national bank, was, on the latter becoming insolvent, sued as a stockholder. *Held*, that a loan of money by a national bank on such security is not prohibited by law; and, if it were, the defendant could not set up its own illegal act to escape the responsibility resulting therefrom.[7]

(*b*) **The Right of a National Bank to deal in United States Government Bonds.** — A national banking association may properly and lawfully engage in the business of exchanging securities of the government of the United States; and will be liable to the depositor of bonds, intended to be exchanged, for their value in case of non-fulfilment of the contract.[8] To the like purport is the ruling that a national bank may lawfully engage and contract to purchase such government securities for a customer.[9]

[5] First National Bank of Charlotte *v.* National Exchange Bank of Baltimore, 39 Md. 600.

[6] Third National Bank of Baltimore *v.* Boyd, 44 Md. 47; Canfield *v.* State National Bank, 1 Northwestern Reporter, 173; Thompson's National Bank Cases, 312.

[7] National Bank *v.* Case, 99 U. S. 628.

[8] Von Leuven *v.* First National Bank of Kingston, 54 N. Y. 671; Leach *v.* Hale, 31 Iowa, 69.

[9] Caldwell *v.* National Mohawk Valley Bank, 64 Barb. 333.

(*c*) **Right of a National Bank to hold Security for Others.** — A national bank probably has authority to receive a deposit as a collateral security for the fulfilment of a contract between outside parties. But even if the transaction is *ultra vires* on the part of the bank, the association would nevertheless be estopped to deny its legality in an action brought by the party to whose use the money had been deposited, and who had entered into the original contract on the strength of the representations of the bank.[10]

(*d*) **Cashier's Term of Office.** — Under the banking act, the cashier of a national bank cannot be irrevocably appointed for a definite time. He is liable to be dismissed at any time, at the pleasure of the appointing power.[11]

(*e*) **Taking Illegal Security.** — If a national bank, in making a loan, takes security of a character which, under the statute, it has no right to take, but subsequently such security is surrendered, the effect and consequences of the illegality are thereby at an end. The bank may subsequently take security of precisely the same kind, for the purpose of securing the debt which has then become already created and pre-existing.[12]

An agreement between persons insolvent and a bank, whereby the insolvents, for the purpose of securing their existing indebtedness to the bank, as well as to obtain future advances, promised its president to deliver to the bank, whenever it may desire, the entire stock of goods which they may have at the time on hand in a store kept by them, the goods being in the mean time retained in their possession, is void, as against their other creditors. Such an agreement does not create any lien upon the property, or entitle the bank to any preference over other creditors, in the event of the debtor's being afterwards proceeded against under the bankrupt law. Any subsequent sale made in pursuance of the agreement does not take effect by relation to its date.[13]

[10] Bushnell *v.* The Chautauqua County National Bank, 10 Hun, 378.
[11] Harrington *v.* First Nat. Bank of Chittenango, 1 Thomp. & C. 361.
[12] Spafford *v.* First National Bank of Tama City, 37 Iowa, 181.
[13] Bank of Leavenworth *v.* Hunt, 11 Wall. 391.

(*f*) **Pledges of Personal Property to Bank.** — A national bank has authority to take personal property,[14] or a mortgage of any personalty, as collateral security for a pre-existing debt.[15]

When a question arises involving the right of national banks to make loans of a particular character upon mortgage, the assignee should be permitted to litigate such question in the Federal courts, and should not be sent into the State courts to try it on the distribution of surplus moneys in a foreclosure suit, or in a suit brought by the party holding the alleged invalid mortgage.[16]

It is the duty of a bank to return a pledge, or show good reasons why it does not. The seizure of a bank by military order, and the appointment of military commissioners who took possession of its assets, is a sufficient ground of defence to an action by the bailee.[17]

(*g*) **Place of Transacting Business.** — The National Banking Act requires "the usual business" of the association to be transacted "at an office or banking-house in the place specified in its organization certificate." This provision is, however, to be construed reasonably. The business of every bank away from its office — frequently large and important — is unavoidably done at the proper place by the cashier in person, or by correspondents or other agents." Thus, where a cashier bought gold and paid for it by certifying checks at the counter of another bank, it was held to be perfectly proper for him to do so.[18]

The general business of a national bank must be transacted at the place of its location. At the same time we know that in the course of business between banks occasionally the officers do give instructions away from the place of business of the bank. If the bank doing such business sends a state-

[14] Pittsburg Locomotive and Car Works *v.* State National Bank, 2 Cent. Law Jour. 692; Thompson's Nat. Bank Cas. 315.

[15] Spafford *v.* First National Bank of Tama City, 37 Iowa, 181.

[16] In re Duryea, 17 Nat. Bank Reg. 495.

[17] McLemore *v.* Louisiana State Bank, 91 U. S. 27.

[18] Merchants' National Bank *v.* State National Bank, 10 Wall. 604.

ment of the same to the other bank, and it, through its proper officer, recognizes the validity of the same, it is bound by such recognition.[19]

A national bank located in New Jersey for the convenience of persons in Philadelphia kept a clerk in that city, who received deposits. *Held*, that the bank did not become located in Philadelphia so as to be liable for taxes. The fact that it violated the law did not make it a citizen of Philadelphia.[20]

A national bank organized in another State is prohibited from keeping an office of discount or deposit in the city of New York, and cannot maintain an action upon any note discounted by it at such office. This prohibition arises from the fact that the bank is a foreign corporation, and from the provisions of the Revised Statutes (Vol. I. p. 708, 2d edition) of New York.[21]

§§ 109, 110. **President.**[1] — Under the act of 1863, section 9, it has been held that the directors have power to remove the president at any time, whether by-laws have been adopted by the association and approved by the Comptroller of the Currency or not.[2]

The directors may discharge any employee at any time for cause. A national bank cannot hire its officers for any specified time.[3]

§ 112. **Lien of Bank on Shareholder's Shares and Dividends.**[1] — The act of 1864 (superseding in this respect the act of 1863) places shareholders in a national bank precisely upon the same footing as outsiders in all dealings with the bank; the bank cannot, by articles of association or by-laws,

[19] Judge Drummond, in Burton *v.* Burley, 12 Leg. News, 178; s. c. 9 Rep. 301.

[20] National Bank of Camden *v.* Pierce, 18 Alb. Law Jour. 16 (U. S. C. C., W. D. Penn.).

[21] National Bank of Fairhaven *v.* The Phœnix Warehousing Co., 6 Hun, 71.

[1] §§ 109, 110. R. S. 5150. See §§ 9, 10.

[2] Taylor *v.* Hutton, 43 Barb. 195.

[3] Harrington *v.* First National Bank, 1 Thomp. & C. 361.

[1] § 112. R. S. 5139. See § 12.

establish any lien on the shares of a shareholder for his indebtedness to the bank; cannot make loans to him in any shape or form upon the security of such shares; and cannot prevent the transfer of the shares by a by-law declaring that they shall not be transferred while the holder is indebted to the bank. The only circumstance which will justify a bank in taking shares of its own capital stock, by way of security, is where this becomes necessary in order to secure an antecedent indebtedness contracted independently of such security. Thus, where a shareholder sold his shares, and the purchaser, bringing a sufficient power of attorney, applied to the bank to transfer them to him, it was held that he was entitled to receive them, or, in default thereof, to maintain his suit for damages, in spite of the fact that the bank had taken them as security for a debt owing from the shareholder, and had actually (under this title) sold some of them, and had passed a by-law prohibiting the transfer of shares by a shareholder indebted to the bank.[2] This decision has been followed by Judge Drummond in the United States Circuit Court for the District of Indiana;[3] also in Maine[4] and in Kentucky.[5] But a contrary doctrine has been asserted by Mr. Justice Clifford and Mr. Justice Sawyer, and by the Supreme Court of Rhode Island.[6]

In New York the court have said that the act of Congress of 1864 does not embody section 36 of the act of 1863, and under it, therefore, there is no express authorization for the directors to establish, by a by-law, a lien upon the shares of a shareholder for his indebtedness to the bank. But it would seem that the power to do this might be contained in the arti-

[2] Bank *v.* Lanier, 11 Wall. 369; Bullard *v.* Bank, 18 id. 589; Johnson *v.* Laflin, 17 Alb. Law Jour. 146.

[3] Evansville National Bank *v.* Metropolitan National Bank, 6 Am. Law Rev. 574; Thompson's Nat. Bank Cas. 189.

[4] Hagar *v.* Union National Bank, 63 Me. 509.

[5] Bank of Louisville *v.* Bank of Newark, 7 Chic. Leg. News, 70.

[6] Knight *v.* Old National Bank, 4 American Law Times Reporter, 240; Thompson's Nat. Bank Cas. 929; Pendergast *v.* Bank of Stockton, 6 Am. Law Rev. 574; Lockwood *v.* American National Bank, 9 R. I. 308.

cles of association, and, if embodied in them, would be valid. But if the power be not set forth in these articles, then it does not exist, and any by-law undertaking to establish such a lien is null and void.[7]

But the bank may attach shares of its own capital stock in a suit against a shareholder, just as it might attach shares belonging to him in any other corporation.[8]

Further, the bank may hold back dividends payable to a shareholder, as an offset against his indebtedness to the bank; and this too though the dividends had been substantially earned before the indebtedness accrued.

(*a*) **Transfer of Stock.**[9] — By the United States Revised Statutes, § 5139, shares of stock in a national bank are transferable only on the books of the bank.[10]

One who allows a transfer of shares of the capital stock in a national bank to be made to him upon the books of the bank, even though it is done solely to secure a debt due him, becomes individually liable as a stockholder, within the U. S. Rev. Sts. § 5138.[11]

A purchaser of national bank stock cannot, by having the transfer made to a third person, escape liability as a stockholder, within the U. S. Rev. Sts. § 5151.[12]

A deed of "all property, real and personal," conveys the grantor's share of bank stock.[13]

A *by-law of a national bank*, though indorsed on a stock certificate, prohibiting a stockholder who is indebted to the bank from transferring his certificate, is void, as in contravention of the U. S. Rev. Sts. § 5201, forbidding banks to loan on security of their own stock.[13] On refusal to make such transfer, the stockholder could maintain a suit for specific performance.[13]

[7] Rosenback *v.* Salt Springs National Bank, 53 Barb. 495; Conklin *v.* Second National Bank, id. 512.

[8] Hagar *v.* Union National Bank, 63 Me. 509.

[9] R. S. 5139. See § 12.

[10] Weyer *v.* Second National Bank of Franklin, 57 Ind. 198.

[11] Moore *v.* Jones, 3 Woods, 53.

[12] Case *v.* Small, 4 Woods, 78.

[13] Feckheimer *v.* National Exchange Bank of Norfolk, 79 Va. 80.

(*b*) **Liability of Stockholders.**[14] — *The liability of a shareholder in a national bank for its debts is held to be discharged by his discharge in bankruptcy*, although the petition in bankruptcy was filed after suit brought to enforce the liability.[15]

U. S. Rev. Sts. § 5151,—making the *shareholders individually liable* for the bank's contracts to the amount of their stock at par value in addition to the amount invested in such shares,—makes this liability an asset of the bank, to be resorted to in case of insolvency, as a sort of guaranty fund.[16]

A stockholder in a national bank is not relieved from his individual liability under the United States Revised Statutes, § 5151, merely by the fact that, with his assent, he has been assessed under § 5205 to restore the impaired capital.[17]

After the Comptroller, in order to discharge the liabilities of an insolvent national bank, has assessed against the several shareholders a sufficient *percentage upon the* par value of the stock by them respectively held, he has *no power to direct a further assessment to supply the deficit caused by the inability of the receiver to enforce payment* from such as are insolvent or beyond the jurisdiction.[18]

The liability of a stockholder of a national bank is several, and is fixed by the mere act of his taking stock in the corporation.[19]

The liability of the stockholders is several, and not joint. The limit of their liability is the par value of the stock held by each one.[20]

The Comptroller is to decide when to enforce the personal liability of stockholders, and whether the whole or a part is to be sued for. His discretion in these matters is conclusive,

[14] R. S. 5157. See § 159 *d*.
[15] Irons *v.* Manufacturers' National Bank of Chicago, 17 Fed. Rep. 308.
[16] Irons *v.* Manufacturers' National Bank, 21 Fed. Rep. 197.
[17] Morrison *v.* Price, 23 Fed. Rep. 217.
[18] United States *v.* Knox, 102 U. S. 422.
[19] Bailey *v.* Sawyer, 9 Leg. News, 191.
[20] Kennedy *v.* Gibson, 8 Wall. 505.

and his action must precede the institution of any suit for this purpose by a receiver.[20]

A religious society which, with a fund previously bequeathed to it, buys and holds in its own name shares of a national bank, is not to be regarded as a trustee, but as an ordinary stockholder, and liable to an *assessment* for the debts *of the bank on its failure*. To protect a trustee who is also a stockholder from such liability, it must appear on the books of the bank that he was such trustee.[21]

The Comptroller's order describing the extent to which the liability shall be enforced is conclusive upon all.[22]

§ 113. (*a*) **Increase of Capital of National Bank.**[1] — There can be no increase in the capital of a national bank prior to the approval of the Comptroller of the Currency and the issue of his certificate in accordance with section 13 of the act of 1864. Accordingly, where the increase was voted, the new shares subscribed and paid for before January 1, 1872, and a dividend declared, payable on both old and new shares, on January 1, 1872, but the Comptroller did not approve the increase, nor issue his certificate, until January 5, 1872, it was held that the new shares were not, for purposes of taxation, "in the hands of the tax-payers on the 1st of January, 1872."[2]

(*b*) "By the articles of association of a national bank, its capital might be increased according to the provisions of the U. S. Rev. Sts. § 5142, and each stockholder had the privilege of subscribing for the increase in proportion to the number of shares already held by him. The directors also had the power to provide for an increase of capital, and to regulate the manner in which it should be made. A by-law of the bank provided that, when an increase of stock should be determined on, the board of directors should notify the stockholders, and cause a subscription to be opened for the same;

[21] Davis *v.* First Baptist Society of Essex, 44 Conn. 582.

[22] National Bank *v.* Case, 99 U. S. 628; Casey *v.* Galli, 94 U. S. 673; Bailey *v.* Sawyer, 9 Leg. News, 191 (C. C. Minn.).

[1] § 113. R. S. 5142. See §§ 13 *a*, 81.

[2] Charleston *v.* People's National Bank, 5 S. C. 103.

and that if any stockholder failed to subscribe for his proportion within a reasonable time, which should be stated in the notice, the directors might determine what disposition should be made of the privilege of subscribing for the new stock. While these articles and this by-law were in force, the directors voted to double the capital stock, and a notice was sent to the stockholders accordingly, which also stated when the subscriptions for the new stock were payable. No subscription books were opened, but A., a stockholder who held forty shares, paid the bank $4,000, and took a receipt which stated that this sum was received "on account of subscription to new stock." The Comptroller of the Currency did not certify his approval of this increase of the capital stock, and the whole amount of the increase was not paid in. The bank suspended payment, and a bank examiner was placed in charge of the bank by the Comptroller of the Currency, and he took possession of all the books and assets of the bank. While this state of things continued, the directors met and passed a vote, which, after reciting the former vote, the amount paid in, and the amount not paid in, declared that the latter sum be cancelled and deducted from the capital stock, and that the paid up capital stock amounted to a certain sum, which was equal to the former capital and the amount paid in under the former vote. The Comptroller of the Currency, upon being notified of this vote, issued a certificate that the capital stock was increased by a certain sum, being that paid in. On the same day, the Comptroller of the Currency notified the bank that, as the entire capital stock was lost, an assessment of one hundred per cent was required to make good the deficiency. After this, the bank made out a certificate for forty shares in the so-called increased capital, and A. was registered in the stock register as the owner of forty shares. No notice was given to A. of the last vote, or of the existence of the certificate, and he never assented to any change in the proposed increase of the capital stock, but demanded back the money paid by him. Subsequently, the bank was allowed to resume business. *Held*, that A. could maintain an action against the

bank to recover the $4,000 and interest from the time of the demand.[3]

This decision was subsequently affirmed. The case reducing itself to this, the directors voted to raise the capital to $1,000,000. E., a stockholder, paid in a sum equal to the stock he held, the vote being that the stockholders should have a right to take the new stock at par to an amount equal that held by them of the old stock. The whole of the proposed increase was not realized. *Held*, that E. had paid in his money on the implied condition that the increase should bring the stock to $1,000,000, and was entitled to recover his money.[4]

(*c*) In September, 1881, A. held thirty shares of stock in a national bank whose capital was $500,000, with a right to increase it to $1,000,000. In that month, the directors voted to increase the capital to $1,000,000, the persons then holding stock to have the right to take new stock at par in amounts equal to those then held by them. A. then subscribed for thirty additional shares, paid for it three days later, and subsequently took out a certificate of stock for it. The amount of increased capital subscribed and paid for was $461,300, instead of $500,000, but A. had no knowledge of this deficiency until after the payment of said subscription, and of the assessment hereinafter referred to. On the 18th of November, 1881, the bank became insolvent, and an examiner was placed in charge of it by the Comptroller of the Currency. In December, 1881, the directors cancelled the increase of the stock above said sum of $461,300, and requested the Comptroller of the Currency to issue a certificate for the increase as so reduced, which he did. No vote of the stockholders was taken, either on increase or decrease. The Comptroller then, under Rev. Sts. § 5205, called upon the bank for an assessment of one hundred per cent on the holders of stock, to pay the deficiency in the capital stock. In January, 1882, the annual meeting of the stockholders was held, at which it was voted to levy the assessment so called for,

[3] Eaton *v.* Pacific Bank, 144 Mass. 260.

[4] Ibid., 10 N. E. Rep. 844, April, 1887.

whereupon the Comptroller permitted the directors to resume control of the bank. A., being notified of this assessment, paid the amount assessed upon his sixty shares, upon being assured by one of the directors of the bank that there would be no other assessment. On the twentieth day of the following May the bank ceased to do business, and the directors thereupon voted to go into liquidation. The Comptroller then appointed a receiver of the bank. In November, 1882, the Comptroller, under Rev. Sts. § 5151, made an assessment on the shareholders of one hundred per cent of the stock held by them respectively. A. declining to pay, the receiver brought an action at law against him to recover that amount on the sixty shares standing in his name. A. thereupon filed a bill in equity to restrain the prosecution of the action. *Held*, —

(1) That the increase of the capital stock of the company to $961,300 was valid.

(2) That this increase was binding on A. to the extent to which he paid for and received certificates of increased stock.

(3) That the payments made in January, 1882, could not be applied, either at law or in equity, to the discharge of the assessments made by the Comptroller in the final liquidation of the bank.

(4) That the payment was not made by A. under a mistake against which equity can relieve him.[5]

"The plaintiff in error, in the action at law, contends, as grounds for reversing the judgment against him, —

"1st. That he was not, at the time of the appointment of the receiver, or at any time, the holder of sixty shares of the stock of the Pacific National Bank, but was, in fact and in law, a holder of only thirty shares thereof. He contends that the attempt on the part of the directors and the Comptroller of the Currency, in December, 1881, to fix the capital stock of the bank at $961,300, was contrary to law and void; that the alleged thirty shares of new stock, on account of which he is sued never had any legal existence, and that he by virtue of his subscription in September, 1881, for thirty shares in the then proposed increase of capital from $500,000 to

[5] Delano *v.* Butler, 118 U. S. 634, 635, 649.

$1,000,000, and by his other acts, never became liable on account of the debts of the Pacific National Bank, beyond his liability as the holder of thirty shares of valid stock.

"2d. That, by his contribution, in January, 1882, of an amount equal to the par value of all the stock ever held by him towards the fund, which was all used in the payment of the debts of the bank, the bank then being insolvent, he in law discharged his liability as a stockholder in said bank, and should therefore have judgment in his favor.

"3d. As appellant in the suit in equity, Delano alleges, as ground for reversing the decree dismissing his bill, that the contribution made by him on January 23, 1882, of an amount equal to the par value of the stock held by him towards a fund which was actually used in the payment of the debts of the bank, the bank then being insolvent, constituted in equity a satisfaction and extinguishment of his liability as a stockholder for the debts of the bank, if not at law." [4]

On the appeal the judgment below was affirmed, the court saying that the defendant paid for the new shares without waiting to see what the Comptroller would do, and with knowledge that the Comptroller could reduce the amount. Also that the conduct of the defendant was a ratification of the transactions he afterward sought to repudiate.

(*d*) **Reduction of Capital Stock.**[5] — A national bank may reduce its capital stock, but cannot retain the proceeds of the stock so retired with the view of establishing a surplus fund, or indeed for any purpose whatsoever.[6]

§ 116. **Deposit of Bonds for Circulation.** — The court cannot, at suit of an individual, interfere with the action of the Comptroller in respect to the bonds. C. claimed title to the bonds deposited by a national bank, by assignment from the bank. The United States Treasurer and Comptroller would not recognize his claim; the Comptroller, on the contrary, appointed a receiver, and the bonds were to be sold to redeem the bank's circulation, the surplus to go to the general fund for creditors.

[5] R. S. 5143 See § 13 *b*.

[6] Seeley *v.* New York Exchange National Bank, Thompson's Nat. Bank Cas. 804.

The court held, on demurrer, that no relief could be granted against the Treasurer or Comptroller, and therefore none against the receiver. As the receiver would not come into possession of the proceeds of the bonds, he had no interest in the suit in any way.[1]

§ 128. **Mortgages of Real Estate to Bank.**[1] — (*a*) The act of 1864, §§ 8 and 28, prohibits a national bank from loaning money upon any other than personal security. A mortgage can be taken as security only for a debt "previously contracted," not for a debt simultaneously contracted, nor for debts to be thereafter contracted. A mortgage taken in contravention of these restrictions is illegal and void,[2] and injunction will issue to prevent foreclosure by the bank;[3] though as security for a pre-existing debt it is unquestionably good.[4] A person having made a mortgage to a bank to secure future advances, and having subsequently made an assignment for the benefit of creditors, it was held that the bank had acted *ultra vires*, and that the assignee might set up the consequent invalidity of the mortgage. The plaintiff, it was said, cannot state its case without showing that it has broken the law, and stating itself out of court.[5]

Where, however, in one and the same mortgage, debts previously contracted, and also debts simultaneously contracted or to be afterward contracted, are alike secured, if the line separating the good from the bad be plain, then the consideration will be divisible, and the mortgage will be void only for so much as is illegal, and will be valid for the rest.[6]

[1] § 116. Van Antwerp *v.* Hulburd, 7 Blatchf. 426.

[1] § 128. R. S. 5137. See §§ 8, 28; I. §§ 74–76.

[2] Kansas Valley National Bank of Topeka *v.* Rowell, 2 Dillon, C. C. 371; Allen *v.* First National Bank of Xenia, 23 Ohio St. 97. But see Spafford *v.* First National Bank of Tama City, 37 Iowa, 181.

[3] Matthews *v.* Skinker, 62 Mo. 329; Woods *v.* People's National Bank of Pittsburg, 83 Pa. St. 57; Crocker *v.* Whitney, Thompson's Nat. Bank Cas. 745.

[4] Woods *v.* People's National Bank of Pittsburg, 83 Pa. St. 57.

[5] Fowler *v.* Scully, 72 Pa. St. 456.

[6] Kansas Valley National Bank *v.* Rowell, 2 Dillon, C. C. 371; Allen *v.* First National Bank of Xenia, 23 Ohio St. 97.

Though a national bank cannot lend money upon security of real estate, yet where a bank lent money and took as security an assignment of a mortgage, the borrower being already indebted to the bank in other unsecured indebtedness, and an oral agreement being make whereby the bank was permitted to hold this mortgage for the security of the prior indebtedness as well as of the newly incurred loan, the transaction was upheld as valid under the statute.[7]

A national bank took, as security for a previous debt, a mortgage on certain real estate on which there existed a prior lien. A part of this prior lien becoming due, the bank, in order to protect and save its own lien, paid what was due, and took another mortgage note to secure the amount. The taking of this second mortgage was held to be no violation of the National Banking Law, as the bank had a right to get all the security it could for such money as it was obliged to pay out.[8]

(*b*) A national bank, in selling and conveying real estate, may lawfully take and hold a mortgage thereon as security for the payment of the purchase money.[9]

Where it appears that a national bank has received an assignment of certain notes and mortgage securities as collateral for a debt, there is no presumption that the debt and assignment were contemporaneous, and that the assignment was consequently in violation of the statute, and void. But the facts which would constitute the illegality must be positively proved by the party seeking to rely thereon.[10]

The power of a national bank to take a mortgage of real estate executed in good faith, to secure pre-existing indebtedness, is not affected by the fact that, at the same time, an old note representing the debt is taken up, and a new one given, with an agreement for periodical renewals.[11]

[7] Upton *v.* National Bank of South Reading, 120 Mass. 153.
[8] Ornn *v.* Merchants' National Bank, 16 Kans. 341.
[9] New Orleans National Bank *v.* Raymond, 29 La. An. 736.
[10] Richards *v.* Kountze, 4 Neb. 200.
[11] Howard National Bank of Burlington *v.* Loomis, 51 Vt. 349.

Under U. S. Rev. Sts. § 5136, a national bank may take, hold, and sue upon coupons attached to a town bond.[12]

A firm, to secure a loan from a national bank, assigned to it a promissory note, and the trust deed of lands that had been executed to the firm to secure it. Upon a bill brought by the maker to enjoin the trustee's sale for nonpayment, on the ground that, under U. S. Rev. Sts. §§ 5136, 5137, the deed did not inure as a security at the time of the assignment, *held* that the bank was entitled to enforce collection by sale of the lands.[13] (A leading case.)

In 1866, a company borrowed of a national bank $10,000, wherewith to complete their hotel, giving as security a deed of trust on the property, and then employed W., a builder, to complete the building, contracting to give him a deed of trust upon it, subject to the first lien, to secure any balance due him on its completion. The company, out of the $10,000, paid W. $8,000, leaving due him, when the work was completed, $5,791. The contractor knew about the deed of trust, and where the money came from; and therefore the court held him equitably estopped to object to the deed of trust, having received the money obtained by it. He had recorded the contract to secure the mechanic's lien, and, January 1, 1867, the company conveyed the property, subject to the lien of the first deed, in trust to secure said balance. *Held*, (1) that such loan by the bank was not prohibited by U. S. Rev. Sts. §§ 5136, 5137, and even had there been a prohibition of such deed of trust, it could not be avoided by the borrower, or his creditors; (2) that W. was estopped from claiming against the trust deed; (3) that W.'s mechanic's lien was subordinate to the lien of the bank under the deed, and the latter was not confined to the property as it was when the deed was made.[14]

(*c*) A national bank may acquire title to real estate, even though encumbered, if honestly done for the purpose of se-

[12] First National Bank of North Bennington *v.* Bennington, 16 Blatchf. 53; compare Lyons *v.* Lyons National Bank, 19 Blatchf. 279.

[13] Union National Bank of St. Louis *v.* Mathews, 98 U. S. 627.

[14] Wroten *v.* Armat, 31 Gratt. 228.

curing a debt due it, and it may do this by taking a conveyance directly, or by sale under process of law. If the purpose is to speculate in real estate under the form or pretence of obtaining satisfaction of a previous debt, it is forbidden by law. Where commission merchants in St. Louis were indebted to a national bank in the sum of $6,500, on drafts drawn on them and accepted, which the bank had discounted in its usual course of business, and to secure such indebtedness transferred to the bank a note of $20,000 on another party, secured by deed of trust upon real estate, subject to further liens, and such other party made a deed of the property to the bank in payment of the sum due him, the bank agreeing to discharge the other liens on the same, *held*, that the transaction was not forbidden by either the letter or the spirit of the National Banking Act.[15]

A married woman indorsed on a note, "I hereby charge my separate and personal estate with the payment of the within note." It was argued that this was a mortgage, and void; but the court said, that no property was conveyed, and the only effect of the indorsement was to create a liability that could be enforced as if she were not married out of any property which would be liable to execution, whether she had it at the time of making the indorsement or acquired it afterward. It would not be necessary to go to equity, nor would the charge be enforced as a lien, but by a common law action in which a personal judgment would be rendered; it is therefore personal security within the meaning of the banking law.[16]

Personal security not real estate.

If the debt is old, the fact that *new* notes are given for it at the time of the mortgage does not affect the validity of the transaction.[17]

The fact that a national bank, at a judgment sale of real estate mortgaged to it, purchased the mortgaged property, and also other property not secured by the mortgage, does

[15] Mapes *v.* Scott, 88 Ill. 352.

[16] Third National Bank *v.* Blake, 73 N. Y. 260.

[17] Farmers & Merchants' Bank *v.* Wallace, 12 N. W. 439 (Ohio).

not invalidate the title to the mortgaged property which § 5137 of U. S. Rev. Sts. authorizes the bank to acquire.[18]

The taking, by a national bank, of the stock of a corporation as collateral security for a loan of money does not violate the prohibition of loaning upon mortgage of real estate, although the property of such borrower consists wholly of real estate.[19]

Mortgages given to a national bank to secure contemporaneous loans by discounting commercial paper in the usual course of business are not void under U. S. Rev. Sts. §§ 5136, 5137; they are only voidable. The Government alone can object.[20] See *ultra vires*, § 722.

§ 129. **Excessive and Unauthorized Loans.**[1] — Section 29 of the National Banking Act forbids any bank to lend to any one person, company, &c., a sum greater than one tenth part of the capital stock of the bank. Where this restriction had been broken, and a greater amount had been unlawfully lent by a bank, it was held that this element of illegality did not avoid the contract, nor enable the debtor when sued for recovery of the loan to escape payment in full.[2] The statute is intended only as a rule for the government of the bank; and an indorser on a note discounted by a bank for the maker, when the maker is already over-indebted to the bank, cannot escape liability on this ground.[3]

Where a national bank had made a loan in excess of the amount which was lawful, but upon which partial payments had been made, whereby the balance was reduced within the legal limit, it was held, in a suit upon a promissory note given for such balance, that the illegality of the original loan could not be availed of in defence.[4]

[18] Reynolds *v.* First National Bank of Crawfordsville, 112 U. S. 405.

[19] Baldwin *v.* Canfield, 26 Minn. 43.

[20] Graham *v.* National Bank of the State of New York, 32 N. J. Eq. 804.

[1] § 129. R. S 5200. See § 29.

[2] Union Gold Hill Mining Co. *v.* Rocky Mountain National Bank, 96 U. S. 640; Shoemaker *v.* National Mechanics' Bank, 2 Abb. (U. S.) 416; Stewart *v.* National Union Bank of Maryland, id. 424.

[3] O'Hare *v.* Second National Bank of Titusville, 77 Pa. St. 96.

[4] Allen *v.* First National Bank of Xenia, 23 Ohio St. 97.

If a national bank makes a loan which is unlawful under the statute, and takes collateral security therefor, the borrower cannot, by reason of the illegality, maintain a bill in equity to have the bank enjoined from parting with the securities, the loan remaining still unpaid.[5]

That a loan by a national bank is in excess of the legal limit, cannot be set up to defeat securities given for it.[6]

§ 130. Interest and Usury.[1]

We will condense the law of this topic as decided by the cases referred to in the following notes. The small letters refer to the divisions of this section 130.

What interest may be taken.

(1) If the laws of the State in which a national bank is located limit the rate of interest, the bank may take as high interest as said laws allow to individuals generally, unless a different rate is fixed for State banks of issue in said State, in which case the latter limit becomes the standard for national banks.

If it is more than the usual rate, national banks may avail themselves of it. § 130.

If it is less than the rate allowed to private parties, national banks will labor under the same disadvantage. (*a.*)

Permitting a few *specified State banks* to take a rate of interest higher than the general law allows, will not privilege national banks. § 130.

(2) Where the laws of the locus do not fix the rate of interest, seven per cent is the limit allowed national banks. §§ 30, 130 *c.*

Consequences of taking or stipulating for usurious interest.

(1) The interest-bearing power of the obligation is destroyed *forever* (*b, c*), and the taint survives through all transformations and renewals, so long as the *obligor remains the same.* (*l.*)

But the note or other obligation itself is not void. The bank may sue upon it, and the surety is bound (*c, g, i*) to the same extent as the maker. The real principal lent can be recovered, and no more (*d*), and any interest that has been paid on the note sued on, or those to which it is a renewal, is to be applied on the principal. (*a, b, d, k.*) *Contra* as to the interest on a series of renewal notes. (*i, k.*)

(2) The violation of law is a cause of forfeiture. § 53.

(3) A penalty is incurred equal to double the whole amount of interest actually paid within two years preceding suit brought. (*a.*)

[5] Elder *v.* First National Bank of Ottawa, 12 Kans. 238.

[6] National Bank *v.* Perry, 33 N. W. 341 (Iowa).

[1] § 130. R. S. 5197, 5198. See § 30.

(x) The right to sue for this penalty accrues as soon as interest has been paid, whether the debt is paid or not. (*i.*)

But only the party who actually had the usurious transaction with the bank, or his legal representatives, [which include his assignee in bankruptcy (*a*, *b*) and the receiver of an insolvent corporation (*n*),] can take advantage of the penalty. (*a.*)

(y) This annihilation of interest-bearing power and this penalty to be recovered precisely as the statute provides are exclusive of all other consequences as between the parties. (*c*, *e*, *f*, *h*, *j*, *k.*)

State laws against usury have no application to national banks. (*c*, *e*, *j.*)

There can be no set-off of the claim for the penalty in a suit brought by the bank on the note; this claim does not arise from contract, but the interest paid may be applied on the principal. (*f*, *h*, *j*, *l.*)

(z) State courts have jurisdiction of suits to recover this penalty (*a*, *h*), *contra* (*d*), unless the bank is located in another State. (*b.*)

(4) If the debtor comes into equity for relief, he must pay *the debt with legal interest.* (*c.*)

The *Statute of Limitations* runs against the right to recover the penalty from the time the interest is paid, but it does not run at all against the right to set up the *defence* of usury to keep the bank from recovering more than the actual amount lent, in any suit by it on the obligation. The destruction of interest-bearing power is not affected by lapse of time. (*g*, *l.*)

Under section 30 of the act of 1864, national banks may charge such rate of interest as is allowed by the State to natural persons generally, and a higher rate if State banks of issue are authorized by State laws to take a higher rate. "National banks have been national favorites," and this, with other provisions, is designed to protect and encourage them, to save them from unfriendly State legislation, and from ruinous competition on the part of State banks. Nay, more, "State banks have been substantially taxed out of existence" by the acts of Congress, and the purpose is manifest to compel a withdrawal of the issues of all State banks from circulation.[1]

Where, by the statute laws of a State, banks are allowed to charge a usurious rate of interest, provided the amount of the excess of interest was evidenced by a memorandum signed by the party to be charged, a national bank located in the State may discount notes and charge thereon

[1] Tiffany *v.* National Bank of Missouri, 18 Wall. 409.

usurious interest in advance without any other special memorandum.[2]

But it has been held that a national bank is not justified in charging an usurious rate of interest because the statutes of the State wherein it is located, permit usurious interest to be taken only by certain specified banks.[3]

If no rate of interest is established by the laws of the State wherein the bank is located, section 30 of the National Banking Act prohibits a national bank from charging interest at a greater rate than seven per cent per annum. This, also, is the law when the bank is located in a State which by its statute laws expressly forbids a corporation to interpose the defence of usury to any action.[4]

It is now conclusively settled, in spite of the contrary decision of the Court of Appeals of New York,[5] that the penalty declared in this section for the exaction by a national banking association of usurious interest is superior to, and exclusive of, any penalty established by State legislation.[6]

(*a*) Under the same section it has been held in Ohio that, if in the State where the bank is situated one rate of interest is allowed by law generally and a less rate is allowed for banks of issue organized under the State laws, a national banking association can charge only the latter and less rate.[7]

It has been held that, in case of the payment of usurious interest having been made, the recovery provided by the statute should be of double the whole amount of interest paid, and

[2] Newell *v.* National Bank of Somerset, 12 Bush, 57.

[3] Duncan *v.* First National Bank of Mount Pleasant, 11 Bank. Mag. 787; Thompson's Nat. Bank Cas. 360.

[4] In re Wild, 11 Blatchf. 243.

[5] First National Bank of Whitehall *v.* Lamb, 50 N. Y. 100. In the lower courts of New York a contrary doctrine has often been expressed; see, for example, this same case, 57 Barb. 429.

[6] Farmers & Mechanics' National Bank *v.* Dearing, 91 U. S. (1 Otto,) 29; Second National Bank of Erie *v.* Brown, 72 Pa. St. 209; First National Bank of Columbus *v.* Garlinghouse, 22 Ohio St. 492; Wiley *v.* Starbuck, 44 Ind. 298; Central National Bank of New York *v.* Pratt, 115 Mass. 539; Davis *v.* Randall, id. 547; Lucas *v.* Governor's National Bank of Pottsville, 78 Pa. St. 228.

[7] Shunk *v.* First National Bank of Galion, 22 Ohio St. 508.

not merely of double the amount in excess of the legal rate; also that the action to recover this penalty may be maintained by the assignee of a bankrupt, where the payment had been made by the bankrupt before bankruptcy.[8]

The party entitled to recover may have judgment for twice the amount of all interest which he has paid within two years next preceding the date of the institution of the suit.[9]

Where a national bank has discounted a note, charging more than the legal rate of interest, it can only recover the amount of the note minus the interest charged. If the note is renewed on the same terms, and the usurious interest is paid in advance, the bank can only recover the face of the note less double the amount of interest paid on renewal, or else the borrower may recover by action of debt double the amount of interest paid on renewal.[10] Apparently the judge did not mean exactly what he said in this case; for he remarked that the result would be the same in both instances. He probably forgot that, in discounting, the note is given for the full sum, and the bank only pays over that sum less the interest. He appears to have thought that the note would be given for the balance of the sum after deduction of the interest, so that a subsequent deduction would have a double effect. (See below, *d*.)

Where a national bank has received a usurious rate of interest, advantage may not be taken of it by way of counter claim to an action brought by the bank more than two years subsequent to the receipt of the illegal interest. Demurrer will lie to such a counter claim.[11]

[8] Crocker *v*. First National Bank of Chetopa (U. S. C. C., per Dillon, J.), 11 Am. Law Rev. 169; 3 Am. Law Times Rep. (U. S.) 350; Thompson's Nat. Bank Cas. 317.

[9] Hintermisher *v*. First National Bank, 64 N. Y. 212; and Crocker *v*. First National Bank, *supra*. See also Shinkle *v*. First National Bank of Ripley, 22 Ohio St. 516.

[10] National Bank of Madison *v*. Davis, 6 Cent. Law Jour. 106; Thompson's Nat. Bank Cas. 350; Brown *v*. Second National Bank of Erie, 72 Pa. St. 209.

[11] National State Bank of Newark *v*. Boylan, 2 Abb. N. Cas. 216; Higby *v*. First National Bank of Beverly, 26 Ohio St. 75.

If a national bank purchases business paper from a person who is the holder and owner, but not the maker thereof, at a usurious rate of discount or interest, the penalty given by the statute may be recovered from the bank only by the party who had the transaction with the bank, or his legal representatives. The maker of the paper cannot avail himself of it in any shape. He is entirely outside of the transaction of bargain and sale, which has no bearing or effect upon his rights, duties, or liabilities.[12]

A State court has jurisdiction of actions against a national bank to recover the penalty imposed by the laws of the United States for taking a usurious rate of interest.[13]

(*b*) In Illinois it has been said that an action brought against a national bank for the penalty for the taking of usurious interest is not within the jurisdiction of a State court, when the bank is located in another State.[14]

Where a national bank takes an excessive rate of interest, the usuriousness of the transaction is not determined, nor does the Statute of Limitations begin to run, prior to the time of final payment or of entering judgment.[15]

But it seems, on the other hand, that a transaction once usurious is always usurious. For it has been said that, where a national bank charges and receives an illegal rate of interest, "the illegal act destroys the interest-bearing power of the obligation, and as there can be no point in the history of such paper at which it is freed from the taint of illegality, so it follows there can be no point of time from which it can bear interest."[16]

To the same principle is also to be referred another Pennsylvania case, in which the court say: "It is clear, then, as to the national banks, that, whenever they charge or stipulate for

[12] Smith *v.* Exchange Bank of Pittsburg, 26 Ohio St. 141.

[13] Ordway *v.* Central National Bank, 47 Md. 217.

[14] Missouri River Telegraph Co. *v.* First National Bank of Sioux City, 74 Ill. 217.

[15] Duncan *v.* First National Bank of Mount Pleasant, 11 Bank. Mag. 787; Thompson's Nat. Bank Cas. 360.

[16] Lucas *v.* Government National Bank of Pottsville, 78 Pa. St. 228.

an illegal rate, all payment of interest, and not merely the excess, is illegal." Consequently, it is held that when a national bank institutes proceedings to recover its debt on the last of a series of renewal notes, the party to whom the loans have been made is entitled to credit for the entire interest paid by him, and not merely to the excess over and above the legal rate.[17]

A national bank received upon a promissory note interest at a rate greater than that allowed in the State where the note was made, thereby violating U. S. Rev. Sts. § 5197. In an action by the bank upon the note, *held*, that this could not be availed of in set-off against the amount due upon the note; but that what the bank was entitled to recover was only, and precisely, the sum named on the face of the note, without interest.[19]

A claim under this section for double the amount of excess in interest passes to the assignee in bankruptcy.[20]

(*c*) The discounting of a note by a national bank at a usurious rate only avoids the interest, not the note. State statutes concerning usury have no application to national banks. On a usurious note the surety is bound to the same extent as is the maker.[21]

The provisions of §§ 5197, 5198, supersede the State laws upon that subject.[22]

If the president of a bank individually agrees with a party on his application to loan him $600 for one year, and to know on what terms he can get it on his note for that amount satisfactorily indorsed, to let him have it at twelve per cent, and when the note is presented takes it and gives

[17] Overholt *v.* National Bank of Mount Pleasant, 82 Pa. St. 490; Cake *v.* First National Bank of Lebanon, Thompson's Nat. Bank Cas. 890; Stephens *v.* Monongahela National Bank, 88 Pa. St. 157.

[19] First National Bank of Peterborough *v.* Childs, 133 Mass. 248.

[20] Wright *v.* First National Bank of Greensburg, 18 Alb. Law Jour. 115; Tiffany *v.* National Bank, 18 Wall. 409.

[21] First National Bank of Columbus *v.* Garlinghouse, 22 Ohio St. 492; National Bank of Auburn *v.* Lewis, 75 N. Y. 516; First National Bank *v.* Stauffer, 6 Week. Jur. 793 (U. S. C. C., W. D. Penn.).

[22] Davis *v.* Randall, 115 Mass. 547.

him a check for $564, the contract will be usurious and void as against the indorser, although the bank had no other knowledge as to the transaction than that possessed by the president.[23]

A national bank discounting business paper at a greater rate than seven per cent is liable to the forfeiture of double the excess over seven per cent, imposed by the act, although the excess is not usurious under the State law.[24]

The knowingly taking or receiving by a national bank of a greater rate of interest than is allowed by the State in which the bank is located is, under the act, usurious.

The forfeiture is of the entire interest. The State courts have jurisdiction of cases arising under the act. When the usury, even by the consent of the debtor, is carried into the general account, the whole contract is tainted, although a note be afterwards given for the amount found due. Where a third party assumes the debt, and the amount he assumes is agreed upon, he cannot set up the usury. But if the amount is undetermined, he may do so. If the debtor comes into a court of equity for relief, he must pay the debt with legal interest.[25]

(*d*) If usury be pleaded in an action brought by a national bank upon a note, and it appears that the usury was taken out of the proceeds of the note, the bank will recover the face of the note less the sums retained. But if, upon a renewal of such a note, the borrower had paid the usurious interest out of other moneys, the defendant may recoup double the amount of interest actually paid, or may recover the same amount in an independent action.[26]

[23] Newport National Bank *v.* Tweed, 4 Houston (Del.) 99, 225; Pickett *v.* Merchants' National Bank of Memphis, 52 Ark. 346; Wheeler *v.* National Bank, 96 U. S. 268.

[24] Johnson *v.* National Bank of Gloversville, 74 N. Y. 329.

[25] Pickett *v.* Merchants' National Bank of Memphis, 32 Ark. 346.

[26] National Bank of Madison *v.* Davis, 10 Leg. News, 156 (U. S. C. C., D. Ind.); s. c. 6 Cent. Law Jour. 106; National Exchange Bank *v.* Moore, 2 Bond, 170; Cheek *v.* Merchants' National Bank, 10 Heisk. (Tenn.) 618; Citizens' National Bank of Piqua *v.* Leming, 8 Inter. Rev. Rec. 132; Wiley *v.* Starbuck, 44 Ind. 298.

In either case the result is the same. The bank loses all interest. If the renewals be made by adding the usurious interest to the principal, then the bank will recover the amount of the last of the renewal series less all interest included in it.[26]

Where the statute required a "memorandum in writing" if a greater rate of interest than six per cent was taken, and the bank discounted notes in which the interest was stated to be at ten per cent, it was *held* that the transaction was not usurious.[27]

Usury paid to a bank must be alleged and proved in order to be recovered. The only person in whom the right of action exists is the person who paid the money.[28]

In order to work a forfeiture under the National Currency Act, it should appear affirmatively that the bank knowingly received or reserved an amount in excess of the statutory rate of interest and the current exchange for sight drafts.[29]

In a suit brought against a State bank to enforce the penalty prescribed by section 5198 for taking a usurious rate of interest, it was *held*, that, although the act gave jurisdiction of such suits to the State courts, the act of taking such interest was penal, and the penalty was provided solely by the Federal statute, and therefore that part of the act which conferred jurisdiction on the State courts was unconstitutional.[30]

(*e*) A bill to recover usury cannot be maintained against a national bank. It is not subject to the laws of the State concerning usury, except so far as Congress may see fit to permit.[31]

[27] Newell *v.* National Bank of Somerset, 12 Bush, 57.

[28] Nash *v.* Manufacturers and Traders' Bank, 5 Hun, 568; Smith *v.* Exchange Bank, 26 Ohio St. 141.

[29] Wheeler *v.* Union National Bank of Pittsburg, 10 Leg. News, 281; s. c. 96 U. S. 268.

[30] Ordway *v.* Central National Bank, 8 Leg. News, 291; s. c. 47 Md. 217. See also Miss. River Tel. Co. *v.* First National Bank, 7 Leg. News, 158; s. c. 74 Ill. 217.

[31] Hambright *v.* Cleveland National Bank, 66 Tenn. 40.

A note actually made and signed in Washington, but dated at Leavenworth, Kansas, and sent to the Second National Bank of Leavenworth and by it discounted, is to be governed, as respects a question of usury, by the law of Kansas. To take out interest in advance on discounting a note by a bank is not usurious. A contract for the loan of money at a rate of interest which is legal in the place where the contract was made, though the money is to be repaid in a State where the rate of interest is lower, is not usurious, provided it be not a mere device to evade the laws of the State where the money is to be repaid.[32]

(*f*) When the maker and indorser of a note resides in New York, and the note is drawn, dated, and payable in that State, the laws of New York must govern as to the rate of interest. If drawn "with interest," the rate will be seven per cent; if drawn without specifying the rate of interest, the same rate of discount must be legal. And where such a note is discounted by a New Jersey bank, the statute of New Jersey limiting the rate of interest to six per cent does not render the note usurious and void when discounted at seven per cent.[33]

A surety cannot avail himself of usurious interest paid by his principal on a non-negotiable note, after execution of the note, in reduction thereof.[34]

A claim against a bank based in usury cannot be set off in an action brought by the bank upon a note other than that upon which the usurious interest was paid.[35]

(*g*) Where a national bank has received upon a promissory note a greater rate of interest than is lawful in the State where the note was made, in violation of Rev. Sts. § 5197, it has been held that the forfeiture provided in Rev. Sts. § 5198 may be availed of in an action brought by the bank on the note in the courts of a State other than that in which the note was discounted. Also that the limitation of two

[32] Second National Bank *v.* Smoot, 2 McArthur, 371.

[33] Hackettstown National Bank *v.* Rea, 64 Barb. 175.

[34] Lamoille County National Bank *v.* Bingham, 50 Vt. 105.

[35] Fraker *v.* Cullum, 24 Kans. 679.

years after the unlawful receiving of the interest does not run against this defence.[36]

But against the right to sue to recover the interest, the statute runs from the date when the usurious interest was paid.[37]

The national banking act does not authorize the courts to declare a contract of indorsement void for usury.[38]

The two years' limitation, Rev. Sts. §§ 5197, 5198, is two years from the time the interest was paid, without regard to the principal.[39]

(*h*) *A State court has jurisdiction of an action by a borrower against a national bank* to recover the penalty prescribed by the Rev. Sts. §§ 5197, 5198, for receiving usurious interest.[40]

The courts cannot, by allowing a *set-off* or otherwise, apply any remedy other than that prescribed by the Rev. Sts. §§ 5197, 5198, for the taking by a national bank of usurious interest.[41]

National banks are subject only to the penalties prescribed by the United States Banking Act, for taking usury.[42]

(*i*) The right of action under the U. S. Rev. Sts. § 5197, to recover double, &c., accrues upon the borrower's actual payment of the illegal interest; the debt need not have been paid.[43]

Illegal interest received by a national bank on a series of renewal notes cannot, in its suit on the last note of the series, be set off by the defendant. His only remedy is by a suit under the National Banking Act to recover the penalty.[44]

[36] First National Bank of Peterborough *v.* Childs, 130 Mass. 519.

[37] Stephens *v.* Monongahela National Bank, 88 Pa. St. 157.

[38] Oates *v.* First National Bank of Montgomery, 100 U. S. 239.

[39] Lynch *v.* Merchants' National Bank of West Virginia at Clarksburg, 22 W. Va. 554.

[40] Ibid.

[41] National Exchange Bank *v.* Boylen, 26 W. Va. 554.

[42] Merchants & Farmers' National Bank of Charlotte *v.* Myers, 74 N. C. 514.

[43] Monongahela National Bank *v.* Overholt, 96 Pa. St. 327.

[44] National Bank of Fayette County *v.* Dushane, 96 Pa. St. 340.

The National Banking Act of 1864, § 30, does not make the *principal debt forfeitable for usury;* and the prohibition does not render the contract void.[45]

(*j*) One who in the United States court has recovered the penalty prescribed by the Rev. Sts. §§ 5187, 5188, for usury, cannot maintain assumpsit in a State court to recover the excess above the legal interest paid to the bank.[46]

The only remedy for a party paying usurious interest to a national bank is that prescribed by the National Banking Act, not by set-off.[47]

(*k*) In a suit by a national bank against all the parties to a bill of exchange discounted by it, the acceptor's assignees, intervening as parties, cannot set up in counter claim that the bank, in discounting a series of bills [or notes] of their assignor, the proceeds of which it used to pay other bills, knowingly took an illegal rate of interest.[48]

The representative of the person paying the unlawful interest can resort to no other procedure than that prescribed by act of 1864 (13 U. S. Stat. at Large, 99, § 30).

Reaffirmed in Driesbach *v.* Second National Bank of Wilkesbarre, 104 U. S. 52. "Usurious interest *paid* a national bank on renewing a series of notes cannot, in an action by the bank on the last of them, be applied in satisfaction of the principal of the debt."[49]

A guaranty of negotiable paper discounted by a national bank is not rendered void by the fact that the bank received usurious interest thereon.[50]

Where a note discounted by a national bank at a usurious rate was several times renewed, and partial payments made, *held*, that, the interest being forfeited, these should be applied to reduce the principal.[51]

[45] National Exchange Bank of Columbus *v.* Moore, 2 Bond, 170.
[46] Hill *v.* National Bank of Barre, 56 Vt. 582.
[47] Oldham *v.* First National Bank of Wilmington, 85 N. C. 240.
[48] Barnet *v.* Second National Bank of Cincinnati, 98 U. S. 555.
[49] Driesbach *v.* Second National Bank of Wilkesbarre, 104 U. S. 52.
[50] Lazear *v.* National Union Bank of Maryland, 52 Md. 78.
[51] Moniteau National Bank *v.* Miller, 73 Mo. 187.

(*l*) The rule that the taint in a usurious contract survives in all its transmutations, applies only to cases in which the obligor or promisor remains the same.[52]

The penalty for usury (U. S. Rev. Sts. § 5198) cannot be set off in an action to recover the principal. The limitation to two years of the right of action to recover it is not available as a defence in an action by the bank.[53]

(*m*) The State courts have jurisdiction of suits to recover the penalty for taking usurious interest under the National Banking Law.[54] In Bletz *v.* Columbia National Bank, the defendant urged that it was a settled principle of law that one sovereignty would not enforce a penalty imposed by another.

The court said that this was not a penalty to be adjudged to the United States or vested in the public, but is a private right belonging to the borrower alone. Justice Bradley, quoting Alexander Hamilton, said, "When we consider the State governments and the national government in the light of kindred systems, as they truly are, and parts of one whole, the inference seems conclusive that the State courts would have concurrent jurisdiction in all cases arising under the laws of the Union, where it was not expressly denied."

The Judiciary Act was framed with this view, giving exclusive jurisdiction to the Federal courts in cases of national import, and concurrent in other cases, as those of civil remedies for the wrongs of individuals. In Buckwalter *v.* United States, a suit in the name of the United States was sustained in a State court for a penalty under United States law, on the ground of the intolerable inconvenience of dragging a man from the remotest corner of a State to the seat of the Federal judiciary, and that such jurisdiction was not in conflict with the United States Constitution.

[52] Macungie Savings Bank *v.* Hottenstein, 89 Pa. St. 328 (1879).

[53] Ellis *v.* First National Bank of Olney, 11 Ill. App. 275.

[54] Bletz *v.* Columbia National Bank, 87 Pa. St. 87; Gruber *v.* First National Bank of Clarion, 8 Wk. Notes, 113 (Pa.); Hade, Receiver, *v.* McVay, 31 Ohio St. 231; National Bank of Winterset *v.* Eyre, 2 N. W. Rep. 995. See Buckwalter *v.* United States, 11 Serg. & R. 193.

As a general proposition, legal or equitable rights acquired under either the State or Federal systems may be enforced by the courts of the other, if its jurisdiction is competent for that kind of subject matter, and such jurisdiction is not specially denied.

(*n*) A national bank charging usurious interest on overdraft loses the right to recover any interest at all.[55]

An agreement between a national bank and M., from whom it had taken usurious interest, that the amount recoverable therefor, under U. S. Rev. Sts. § 5198, should be applied to reduce M.'s indebtedness to the bank, and that the bank, in consideration thereof, should satisfy such balance as should remain due to it after application of certain collections, was held to preclude maintenance of an action against the bank by the receiver of M.'s estate, in proceedings supplementary to execution.[56]

Usurious discount by a national bank destroys the interest-bearing power of the note.[57]

In a suit to recover the penalty under § 5198, the bank cannot set off a judgment or other claim held by it against the plaintiff.[58]

A receiver of an insolvent corporation is a legal representative within Rev. Sts. § 5198.[59]

(*z*) **Banks of Issue.** Under U. S. Rev. Sts. § 5197, "banks of issue" do not include savings banks nor banks of deposit.[60]

§ 135. A national bank organized under the law of 1864 cannot, even by specific provisions for the purpose in its articles of association and in its by-laws, acquire a lien on its own stock held by its debtor.[1]

[55] Third National Bank of Philadelphia *v.* Miller, 8 Pa. St. 241.

[56] Morehouse *v.* Second National Bank of Oswego, 98 N. Y. 503.

[57] Guthrie *v.* Reid, 107 Pa. St. 251.

[58] Lebanon National Bank *v.* Karmany, 98 Pa. St. 65.

[59] Barbour *v.* National Exchange Bank, 12 N. E. 5 (Ohio).

[60] First National Bank of Clarion *v.* Gruber, 87 Pa. St. 468.

[1] § 135. Delaware, L., & W. Railroad Co. *v.* Oxford Iron Co., 38 N. J. Eq. 340. See I. § 698 A.

§ 141. Taxation of National Banks.[1]

By the United States. § 41.
Tax return to be made. § 41.
Penalty for failure. § 41.
Tax on dividends. § 141 *w*.

By the State.

I. Power of State.

Congress may protect national institutions from death by State taxation (§ 141); but so far as not prohibited, the States may tax national banks (*p*). Congress having exercised its power and prescribed the conditions of State taxation, all taxation, except as expressly permitted, is prohibited. (*l*, *o*.)

II. Conditions and limitations of State power.

The object of the law is to prevent unfair discrimination against national banks, which would interfere with their success, and the spirit not the letter of the law controls. (*b*, *y*.)

(1) Wherefore, "*other moneyed capital*" in this statute is to be interpreted to mean money employed to make a profit by using it as money; such capital as is employed in banking business (loaning, discounting, investing in government securities, &c.), and all capital in the hands of individuals employed in a similar way, invested in loans or securities for the payment of money, either as a permanent investment, or temporarily, with a view to sale or repayment, and reinvestment. (*y*.)

On *such* moneyed capital, *in general* (*w*, *c*, *y*), the tax levied by the State must not be less than that upon national banks. Even particular portions of such capital may be exempted by the State without affecting its right to tax national banks, so long as the amount exempted is not sufficient to affect substantially the general rate of taxing such capital (*c*, *c* [2], *v*); otherwise, if the amount is considerable (*w*).

(2) But money in the hands of a corporation not used as above, and therefore not liable to come in conflict with national banks, is not within the view of this law, though its shares are moneyed capital in the hands of individual holders. (*y*, *w*.)

Exemptions not affecting the State's right to tax national banks.

Trust companies under the New York laws are not within the reason of the provision, and their exemption would not affect national bank taxation. (*y*.)

Savings bank deposits are exempted for a good reason, — to encourage accumulation by the poorer classes. They are moneyed capital in the hands of individuals. But it is equally clear that they are not within the reason of the law. Savings banks cannot come in serious conflict with national banks. Only banks of issue could work a displacement of them; and

[1] § 141. R. S. 5215, 5219. §§ 41, 77, 80.

an *exemption of some particular moneyed capital*, if not amounting to an unfriendly discrimination against national banks, will not operate to exempt national banks from the State tax. (*y.*)

Assessing the paid-up capital of savings banks not an unlawful discrimination. (*z.*)

When a State has done all in its power to conform to the United States law, and tax State banks equally with national, but is prevented by old charters which a few of the banks refuse to give up, such substantial compliance by the State is sufficient. (*d.*)

Municipal bonds are moneyed capital, but, not being ordinarily subject to taxation, they are not within the reason of the law. (*y.*)

Exemption of mortgages, judgments, recognizances, and moneys owing on agreements for the sale of lands, does not affect the right to tax national banks; 1st, it is a just exemption to prevent double taxation; 2d, it is only a partial exemption. (*y.*)

Exemption of shares of manufacturing, mining, and insurance companies cannot affect the competition against or success of national banks, and there is therefore no reason to suppose that Congress intended to interfere with the right of the States in respect to such companies. (*y.*)

What does affect the State's right?

Any considerable exemption of moneyed capital as above expounded. (*w.*)

A tax on "capital" is not equivalent to a tax on "shares," for a part of the capital may be so invested as to escape from the former. If, therefore, State banks are taxed on their capital instead of their shares, the State cannot tax national bank shares. (*d, e, m, t.*)

If the owner of other moneyed capital may deduct his debts, and a national bank shareholder cannot, it is an unlawful discrimination. (*w.* See *r.*)

Assessing national bank shares at full value, and other property at four per cent of its value, is illegal. (*b.*)

III. What may be taxed.

(1) The *shares, real estate*, and *surplus* capital of national banks may be taxed by the State, double taxation being avoided. (*a, t, w.*)

That is, if the real estate is taxed as such, its amount must be deducted from the assessment of the shares in taxing the latter. (*b, l.*)

Dividends may be taxed. (*t, v, w.*)

(2) The *capital* in mass, as distinguished from the shares, cannot be taxed. (*b.*)

The personal property of the bank is not taxable. (*w, v.*)

New shares cannot be taxed until the Comptroller issues his certificate of approval. (*s.*)

Circulating notes of a national bank are not taxable. (?) § 141.

United States legal tender notes cannot be taxed in the hands of a bank; but it does not follow from such possession that the notes represent any part of the capital shares on which a tax is laid. The notes may represent deposits, &c. (*u.*)

(3) The fact that the bank's capital is invested in United States bonds does not prevent taxation upon the shares. (*c, d, r.*)

IV. "Other moneyed capital." See above, II.

The provision does not refer to over-valuation, but the rate per cent established for taxation. (*r.*)

Refers to other *taxable* capital. (*x.*)

Means not only capital invested in State banks, but extends to all capital in the hands of citizens generally. (*v.*)

V. Manner of taxing, &c.

Shares are to be assessed at their actual market value, not their par value. (*b, c, r.*)

Is free to the choice of the State, but the valuation of shares must not be excessive. (*c, j.*)

The tax may be made a lien on the shares. (*i, j.*)

And it may be made payable by the bank instead of by the individual shareholders. (*a, g.*)

The State may require national banks to send the town clerk a list of its shareholders. (*h.*)

In Massachusetts, the shareholder must give yearly notice to the bank of his residence. (*i.*)

VI. Place.

National bank shares are to be taxed in no other *State* than the one in which the bank is located. §§ 41, 141, *e, g, i, l.*

But the State may use its discretion about taxing the shares in the township of the bank or of the owner's residence. (*f, p, s.*)

Shares of a deceased person are to be assessed at his domicil. (*n.*)

Deposits received at the Philadelphia office of a New Jersey bank are not taxable in Philadelphia. (*r.*)

VII. Change of State to national bank.

Questions of taxation. (*n, s.*)

VIII. Construction of "municipal purposes." (*a.*)

IX. Repeal of a tax law does not affect taxes already assessed. (*a.*)

X. Injunction, &c.

A court will not relieve from inequality of valuation resulting from mere error of judgment, but only when it was intentional. (*x.*)

Will be granted in case of assessing national shares at a greater per cent than other property. (*u.*)

Will be granted where the law gives no remedy for recovery of tax, if paid. (*b.*)

No injunction if the assessment, though wrong, does not do substantial injustice. (*e.*)

The bank, as a corporation, may complain of an illegal assessment. (*b.*)

As trustee for the stockholders, it may enjoin collection, thus avoiding multiplicity of suits. (*a, v, x.*)

§ 141. **Taxation.** — Congress has power to protect the national banks, by forbidding the States to tax them. But they are not exempt from State taxation, unless Congress has actually exercised this power.[1]

The Act of Congress enacting "that every national banking association, State bank," &c., "shall pay a tax of ten per centum on the amount of notes of any person, State bank," &c., "used for circulation and paid out by them," is not in violation of the Constitution, as being a direct, and not an apportioned tax, nor because the act imposing the tax impairs a franchise granted by the State.[2]

Reade, J.: "The power of Congress to tax the circulation of State banks depends upon whether they are for the use of the State government or for private profit; so the power of the State to tax the circulation of national banks depends upon whether they are for the use of the United States government or for private profit."[3]

Where by a State statute the owners of shares in national banks located within the State are subject to taxation on the *par value* of the shares owned by them, a statute authorizing the taxation of the surplus capital of banking institutions is valid.[4]

Personal property, or, in other words, safes, office furniture, cash on hand and due from other banks, bills discounted, &c., that is, the so-called assets of a national bank, are not subject to taxation.[5]

A State law enacting that the stock of a national bank shall be assessed for taxes, as so much capital in the aggregate, intending that the tax should be levied on the sum total of the capital stock of the bank, is illegal. "The only way that such stock can be reached is to assess the shares of the differ-

[1] State *v.* Fuller, 34 Conn. 280.

[2] Veazie Bank *v.* Fenno, 8 Wall. 533.

[3] Ruffin *v.* Board of Commissioners, 69 N. C. 498.

[4] First National Bank *v.* Peterborough, 56 N. H. 38. See also State, North Ward National Bank of Newark *v.* Peterborough, 10 Vroom, 380.

[5] National State Bank of Oskaloosa *v.* Young, 25 Iowa, 311.

ent stockholders, in the same manner that assessments are made in other cases against property owned by the citizens and inhabitants of the State." [6]

The notes of a national bank, issued under authority of Congress for the purpose of circulation, are obligations of the national government, and are not taxable.[7]

The contrary has also been held.[8]

(*a*) A State statute requiring all the shares of a national bank to be assessed and taxed at their actual tax value, without any deduction on account of the real property held by the bank, and in which a portion of its capital is invested, does not authorize the taxation of real property, *eo nomine*, lawfully owned and used as a place for the transaction of its business by a national bank; for tax acts are presumed not to impose a double burden.[9]

Where by city charter an authority is given to collect a privilege tax, and by further legislative enactment "banks and banking" are specially deemed as privileges, the intention of the legislature is not to be so interpreted as to subject national banks to taxation.[10]

By a statute of Indiana it was provided that a national bank should not be assessed for municipal purposes. A demurrer was sustained to a bill brought to restrain the collection of taxes assessed against a national bank for school purposes, or to aid in the construction of a railroad, these not being "municipal purposes" within the purview of the statute.[11]

The warrant in the hands of a collector of taxes assessed on national bank shares ordered him "to levy the same of the goods and chattels" of the shareholders. It was

[6] Collins *v.* Chicago, 4 Biss. 472; St. Louis National Bank *v.* Papin, 3 Cent. Law Jour. 669; Thompson's Nat. Bank Cas. 326.

[7] Horne *v.* Green, 52 Miss. 452.

[8] Board of Commissioners of Montgomery County *v.* Elston, 32 Ind. 27.

[9] Board of County Commissioners of Rice County *v.* Citizens' National Bank of Faribault, 23 Minn. 280.

[10] National Bank of Chattanooga *v.* Mayor, 8 Heisk. 814.

[11] Root *v.* Erdelmeyer, 37 Ind. 225.

held, that under this authority he was not authorized to enforce collection by a seizure and sale of the property of the bank.[12]

But if the State statute enacts that the taxes on the shares shall be paid by the bank, then the property of the bank may be distrained in case of nonpayment of such taxes.[13]

Where city assessors assessed a tax upon a national bank, which tax was expressly prohibited by State law, and then, in order to enforce the assessment, sold the property of the bank, it was held that an action would lie by the bank against the city.[14]

An act in relation to the assessment of taxes which reads, "All acts and parts of acts inconsistent with this act are hereby repealed," relates only to the *future* assessment of taxes. It does not relate to the collection of taxes which have been duly assessed under previously existing laws.[15]

A national bank, as trustee for the entire body of stockholders, may maintain a bill in equity to restrain the collection of a tax upon its shares, when a multiplicity of suits is thereby avoided. And where a multiplicity of suits would ensue upon the enforcement of the tax, or where the law which authorizes the tax is itself invalid, an injunction is the proper remedy. The better rule is, that the taxation of national banks should conform to that of State banks, and that neither the highest nor lowest rate of taxation should be imposed upon a national bank, where, by the law of the State wherein such bank is situated, different classes of moneyed capital are to be taxed at different rates.[16]

(*b*) A court of equity will not restrain the collection of a tax upon the shares of a national bank because a State statute does not set forth in express terms that there shall be no

[12] First National Bank of Sandy Hill *v.* Fancher, 48 N. Y. 524.

[13] First National Bank *v.* Douglas County, 3 Dillon, 330.

[14] National Bank of Chemung *v.* Elmira, 53 N. Y. 49.

[15] Weld *v.* City of Bangor, 59 Me. 416.

[16] City National Bank *v.* Paducah, 5 Cent. Law Jour. 347; Thompson's Nat. Bank Cas. 300.

greater assessment upon national banks located within the State than upon the State banks.[17]

National bank shares having been assessed at their full value, while all other property in the State was only assessed at from thirty to forty per cent of its real value, the court held that the assessment was illegal, and that the bank in its corporate capacity was a proper party complainant.[18]

Where the law gives no remedy against a State for the recovery of taxes paid under duress, a court of equity may enjoin their exaction, and may adjudicate at the same time as to the validity of both county and State taxes, where both are sought to be enforced under one warrant.[19]

A State may tax shares in the capital stock of a national bank, but cannot tax the capital of the bank when invested in government securities. Miller, J., says: "But we are of opinion that while Congress intended to limit State taxation to the shares of the bank, as distinguished from its capital, and to provide against a discrimination in taxing such bank shares unfavorable to them as compared with the shares of other corporations and with other moneyed capital, it did not intend to prescribe to the State the mode in which the tax should be collected." [20]

A statute which authorizes the taxation of the shares of a national bank after a certain special system is rendered void by a constitutional amendment which reads, "Property shall be assessed for taxes under general laws and by uniform rules, according to its true value." [21]

In assessing the shares of stock in a national bank, the shares must be assessed at their full market value, and not at their par value.[22]

[17] First National Bank *v.* Douglas County, 3 Dillon, 330.

[18] Merchants' National Bank of Toledo *v.* Cumming, Thompson's Nat. Bank Cas. 926.

[19] First National Bank of Omaha *v.* Douglas County, 3 Dillon, 298.

[20] National Bank *v.* Commonwealth, 9 Wall. 353; Hershire *v.* First National Bank, 35 Iowa, 272; and see Lionberger *v.* Rouse, 9 Wall. 468.

[21] State, North Ward National Bank of Newark *v.* City of Newark, 10 Vroom, 380.

[22] People ex rel. Williams *v.* Assessors of Albany, 5 Thomp. & C. 155.

Shares of stock in a national bank are to be assessed at no greater rate than other moneyed capital in the hands of individuals. By the statute laws of New York the assessment must be made on the entire value of the shares, after deducting therefrom a sum proportionate to the ratio which the assessed value of the real estate bears to the whole capital stock.[23]

(*c*) The National Banking Act, Rev. Sts. § 5219, limits the power of the States to taxation upon the shares in national banks; and this cannot be evaded by ordering the collectors to include the value of the bank's property in the value of the shares. But a bill of complaint will be dismissed where it is not shown that the valuation of the shares by the assessors is excessive, no matter how incorrect was the method by which such valuation was arrived at.[24]

The shares of national banks must be ascertained, in some form, in order to determine their taxable value, and a State may authorize the appraisement of these shares for taxation at the current market value of the stock at the place where the bank is located.[25]

A national bank may be assessed for municipal or school taxes, although in the county where the bank is located all mortgages, judgments, recognizances, and moneys owing upon articles of agreement for the sale of real estate are exempt from taxation except for State purposes, the exemption being a partial one only.[26]

(*c* [2]) The act of Congress which prohibits the shares of a national bank from being assessed at a greater rate than other moneyed capital in the hands of individual citizens, does not prevent a national bank, whose capital is invested in United States bonds, from being taxed on its shares, although indi-

[23] People ex rel. Tradesmen's National Bank *v.* Commissioners of Taxes and Assessments, 69 N. Y. 91.

[24] St. Louis National Bank *v.* Papin, 3 Cent. Law Jour. 669; Thompson's Nat. Bank Cas. 326.

[25] People *v.* Commissioners of Taxes and Assessments, 94 U. S. 415; City of Richmond *v.* Scott, 48 Ind. 568.

[26] Hepburn *v.* The School Directors, 23 Wall. 480.

vidual citizens of the State where the bank is located are not taxed on their government securities. The true construction of the act is, that the rate of taxation of the shares should be the same as, or not greater than, that established for the moneyed capital of the individual citizen which is subject to taxation.[27]

"The act of Congress was not intended to curtail the State power on the subject of taxation. It simply required that capital invested in national banks should not be taxed at a greater rate than [other] like property similarly invested. It was not intended to cut off the power to exempt particular kinds of property, if the legislature chose to do so." The discretionary power of State legislatures remains to a certain extent.[28]

(*d*) It has been decided by the Supreme Court of the United States, that under the act of 1864 (differing in this respect from the act of 1863) a State may tax the shares of shareholders in a national bank located within the State; provided that such shares be not taxed at a greater rate than is assessed upon the shares of any of the banks organized under the authority of the State.[29]

Neither is this rule affected by the fact that the capital of the bank is invested in government bonds not taxable by State authority.[30]

But a tax on the capital of a State bank is not equivalent to a tax on the shares of a national bank, and taxation of these shares is not justified by the fact that a tax is imposed on the capital of the State banks. The possible inequality would at once appear in the case of the capital, or any large part thereof, of the State bank being invested in such a manner (e. g. in government bonds) as to escape taxation.[31]

The Supreme Court have also gone very far in an effort to make the legislation of Congress conformable to the apparent

[27] People *v.* The Commissioners, 4 Wall. 244; City of Richmond *v.* Scott, 48 Ind. 568.

[28] Adams *v.* Mayor, &c. of Nashville, 16 Alb. Law Jour. 416.

[29] Van Allen *v.* The Assessors, 3 Wall. 573.

[30] Ibid. [31] Ibid.

exigencies of common sense, and have held, in effect, that a State may tax shares in national banks if it has done all in its power to tax State banks at the same rate, although it has not been able really to do so by reason of restrictions upon its power. There may be a great deal of wisdom and a sound respect for practical expediency in the decision rendered in the case of Lionberger *v.* Rouse,[32] but it is certainly very absurd law. It amounts simply to this. The State of Missouri did all it could to tax the State banks within its limits at the rate at which it taxed national banks; it succeeded in inducing all the State banks save two to reorganize on the national basis; but these two obstinately retained their State charters and continued to do business thereunder; these charters prevented the State from imposing a tax on these two banks in conformity with the tax imposed on the shares in the national banks located in the State. The court said, that since unfortunately the State could not do what it would like to, therefore it might be excused from doing so; and having done its best to comply with the provisions of the national statute, it might reap the advantages of compliance, though unable in fact to achieve it. In a word, the Supreme Court said that it was proper in this instance to accept the will for the deed, and Missouri was allowed to collect the tax from the national banks. The opinion is ingenious and plausible, but perfectly unsound. The case seems to fall practically within the principle that an exemption *in certain particular cases* does not affect the general power of taxing national banks.

(*e*) A State statute providing for the assessment of taxes against national banks was declared illegal by the court, for the reason that it imposed a tax on the shares of national banks, when State banks were only assessed on their capital. This law was then amended by a subsequent statute repealing "all acts and parts of acts inconsistent with this act." It was held that this latter enactment repealed the provisions for taxing the capital of State banks, and left the way clear and unobstructed for the assessment of taxes against the

[32] 9 Wall. 468.

shares in national banks without violating section 41 of the National Banking Act.[33]

The shareholders in the Union National Bank complained that the bank had been taxed on its real estate, and that when the shares of stock were assessed, the value of the real estate should have been deducted from the gross value of the stock, it being so deducted in the assessment of the stock of all other banks owning real estate. They failed, however, to show that any injustice was done them by this process, since the sum total of stock and real estate assessed fell considerably below one half the cash value of the stock. The court refused to grant an injunction.[34]

The provision in section 41 of the act of 1864 requires that State taxes be imposed "at the place where the bank is located, and not elsewhere." Held, that the legislature of a State has the right to fix the *situs* of shares at its discretion, and may tax the shares at the place where the bank is located, whether the shareholders reside there or not.[35]

(*f*) By the act of 1864 shares in national banks may be taxed by the States, and are to be included in the valuation of the personal property of the holder, "in the assessment of taxes imposed by or under State authority, at the place where such bank is located, and not elsewhere." A State statute enacting that the assessment for taxation shall be made where the shareholders reside, independently of the locality of the bank, does not invalidate an assessment made upon the holder of shares in a national bank, located where the assessment is made, although in another case, arising upon a different state of facts, the statute might produce results in conflict with the act of Congress.[36]

A State statute enacting that stockholders in national banks

[33] Morzeman *v.* Younkin, 27 Iowa, 350.

[34] Nickerson *v.* Kimball, 1 Chic. Law Jour. 42; Thompson's Nat. Bank Cas. 409.

[35] First National Bank of Mendota *v.* Smith, 65 Ill. 44; Whitney et al., appellants, *v.* Ragsdale, 33 Ind. 107; also Nickerson *v.* Kimball, 1 Chic. Law Jour. 42; Thompson's Nat. Bank Cas. 409.

[36] Austin *v.* The Aldermen, 7 Wall. 694.

"shall be assessed and taxed on the value of their shares of stock therein in the county, town, or district where such bank or banking association is located, and not elsewhere, whether such stockholders reside in such town, county, or district or not, but not at any greater rate than is or may be assessed upon other moneyed capital in the hands of individuals in this State," is valid, and no violation of the constitutional rule of uniformity of taxation.[37]

The National Banking Act allows shares in a national bank to be taxed in such manner and place as the State may determine, and therefore a State statute is valid which provides for the taxation of national bank shares in the township where the bank is located, except where a stockholder resides in another township in the same county, and in that case that his shares shall be taxable in his own township. But under such a general statute law a village charter which authorizes the taxation of "all property, real and personal, within the limits of said village," does not authorize the taxation of the shares of a national bank located in the village, when the shareholder is a resident of another township in the same county.[38]

(*g*) By the constitution of North Carolina all property must be taxed, unless especially exempted in the constitution. Therefore shares in a national bank located within the State, held by a non-resident of the State, may be taxed without a special statute authority. "Neither the legislature nor the town corporation can exempt them from taxation without doing violence to the constitution."[39]

A State has no authority to assess a tax against a citizen of that State for shares owned by him in a national bank located in another State. It is constitutional for Congress to establish a national bank in any State, and to provide that its shares shall not be taxed by any other State.[40]

[37] Tappan *v.* Merchants' National Bank, 19 Wall. 490. See Van Allen *v.* The Assessors, 3 Wall. 573; People *v.* The Commissioners, 4 Wall. 244; Hepburn *v.* School Directors, 23 Wall. 480.

[38] Howell *v.* Village of Cassopolis, 35 Mich. 471.

[39] Kyle *v.* The Mayor, &c., 75 N. C. 445.

[40] Flint *v.* Board of Aldermen of Boston, 99 Mass. 141.

It is lawful for the State to enact that the taxes on shares in the capital stock of national banks, located within the State, shall be paid by the bank.[41]

Under the statutes of Iowa, in order to make a national bank liable for a tax assessed against certain of its shareholders, it must be shown that the bank has, or has had, in its possession and control dividends or other money or property belonging to such delinquent shareholders.[42]

But in Kentucky the statute provides that a national bank shall be liable absolutely for the taxes upon shares.[43]

The plaintiff purchased stock in a national bank on March 1. The purchase money had been assessed against the plaintiff on January 1. Held, that he could be assessed for the stock held by him on April 1, notwithstanding he had paid the taxes on the money with which the stock was purchased.[44]

(*h*) A statute of the State of Vermont required the cashier of each national bank within the State, as well as the cashiers of all other banks, to transmit to the clerks of the several towns in the State in which any shareholder in the association should reside, a true list of the names of such shareholders, with the number of shares recorded in the name of each, and the amount of money actually paid in on account of each share. It was argued that the requirement in the act of Congress that each national bank should keep a list of its shareholders posted up in its business office covered the ground of this State enactment, and that therefore the State enactment was void, as trenching on the domain already lawfully occupied by Congressional legislation. The court, however, held otherwise, declaring the statute to be valid, and not in conflict with the act of Congress, which had no such purpose as the State statute, but was designed merely to furnish to the public dealing with the bank a knowledge of the names of its corporators, and to what extent they might be relied upon as giving safety to dealing with the bank.

[41] First National Bank *v.* Douglas County, 3 Dillon, 330.

[42] Hershire *v.* First National Bank, 35 Iowa, 272.

[43] See *supra*, National Bank *v.* Commonwealth, 9 Wall. 353.

[44] City of Richmond *v.* Scott, 48 Ind. 568.

Whether the motive of this State requirement was to aid illegal taxation or not was said to be of no consequence. This especial obligation could be lawfully imposed; when any taxation should be subsequently attempted, then the question of the legality of that taxation would be separately and properly raised.[45]

(*i*) By a statute of Massachusetts, it is provided that every shareholder in a national bank shall every year give notice to the bank of his place of residence; and if he neglects to do this his shares are to be made subject to taxation in the city or town where the bank is located, as well as in the city or town where he resides. One who was a resident of B. paid, under protest, a tax assessed against him as a resident of A. Held, in an action by him to recover the amount so paid, that the *onus* was on the plaintiff to show that the statement made by him to the cashiers of the bank, as to his place of residence, was not intentionally false.[46]

By a statute of Massachusetts concerning the taxation of bank shares, it is provided, "that such shares owned by non-residents of this Commonwealth shall be assessed to the owners thereof in the cities or towns where such banks are located, and not elsewhere; that the tax shall be a lien on their shares; that the value of such shares shall be omitted from the valuation upon which the rate is to be based; and that the proceeds of the tax upon such shares, when collected, shall be paid over by the treasurer of the town or city to the State treasurer." Held, not unconstitutional, as being in violation of the National Banking Act, the word "place" in the statute meaning the State where the bank was located;[47] that it did not impose a greater rate than was assessed upon other moneyed capital in the hands of individual citizens, and was not a disproportionate tax; and that no objection could lie to the fact that it is retrospective in its operation.[48]

(*j*) A State statute which exempts from taxation "all shares

[45] Waite *v.* Dowley, 94 U. S. 527.

[46] Goldsbury *v.* Inhabitants of Warwick, 112 Mass. 384.

[47] Austin *v.* Board of Aldermen of Boston, 14 Allen, 359.

[48] Provident Institution for Savings *v.* City of Boston, 101 Mass. 575.

of the capital stock of any company or corporation which is required to list its property for taxation in this State" has no application to the shares of a national bank the property of which consists of United States government bonds.[49]

Where by the charter of a city assessments for taxes should be made on April 1, and an act is passed by the State that for a certain year banks should be taxed as of July 1, it is necessary for the party so assessed on his shares in a national bank, when calling upon a court of equity for relief, to allege and prove that he has been injured thereby; that by reason thereof his shares have been valued too high, or that there was a difference in the value on the two specified days, whereby he had been compelled to pay a double or greater tax. The act does not *per se* violate the Constitution, nor did the National Banking Act intend to prescribe a mode by which alone the State could tax the shares; that being for State legislation to determine, subject to certain restrictions. Therefore, where it had been customary to make assessments upon the capital stock of national banks for revenue purposes, and these taxes were in process of collection, a State statute enacting that they should be vacated, and that, to supply the deficiency in the revenue, the assessors should be required to assess the shareholders in the banks upon the value of their shares, is not unconstitutional. "To get at the shares, it would be proper to require them to be included in the valuation of the personal property; not that they should, but might, occupy a different column in the list. It cannot be understood to mean . . . that they should be included in such valuation, to enable the shareholders to deduct from their value such debts as they might owe, as acquired by the general revenue law."[50]

(*k*) By statute of Wisconsin taxes were imposed upon shares in national banks. That law makes the taxes which it imposes a lien upon the shares of stock taxed. Hence where the defendant sold national bank shares to the plaintiff, on which, without the plaintiff's knowledge, there was an unpaid tax due, and the tax was afterwards paid by the bank, as by law pro-

[49] McIver *v.* Robinson, 53 Ala. 456.

[50] McVeagh *v.* City of Chicago, 49 Ill. 318.

vided, it was held that the plaintiff could recover damages from the defendant to the amount of the tax so paid.[51]

Replevin will lie to recover a package of bank bills belonging to a national bank, which had been taken by the county treasurer in satisfaction of a tax assessed against shareholders of the bank.[52]

By the general tax law of the State of New York it is provided that each individual shall be assessed for the full value of all the taxable personal property owned by such person, after deducting the just debts owing by him. But it was held that this did not permit the owners of shares in a national bank to deduct debts from the assessed value of their shares taxed under a subsequent statute law providing that such shares should be taxed at their value.[53]

The meaning to be put upon the words "*place* where the bank is located," occurring in section 41, has caused much litigation, and the decisions have been far from harmonious.[54] The discussion has now been put at rest by the amendment of February 10, 1868, which enacts that "place" shall be construed to intend "State."

(*l*) **Alabama.** — National banks, being an instrumentality of the general government, are not subject to taxation by the States except in so far as Congress may expressly permit.[55]

Indiana. — The Federal and the Indiana statutes construed together indicate that real estate owned by a national bank must be assessed as realty in the township where situated, and not as a part of the capital stock of the bank.[56]

The act of Congress approved February 10, 1868, places but one limitation on the taxing power of the State; namely,

[51] Simmons *v.* Aldrich, 41 Wisc. 240.

[52] First National Bank *v.* Hershire, 31 Iowa, 18.

[53] People ex rel. Cagger *v.* Dolan, 36 N. Y. 59. See City National Bank *v.* Paducah, 5 Cent. Law Jour. 347; Thompson's Nat. Bank Cas. 300.

[54] See Austin *v.* The Aldermen, 7 Wall. 694; State *v.* Haight, 2 Vroom, 399; State *v.* Hart, id. 434; State *v.* Cook, 3 id. 347; Opinion of Justices, 53 Me. 594; Packard *v.* Lewiston, 55 id. 456; Mayor *v.* Thomas, 5 Cold. 600.

[55] National Commercial Bank of Mobile *v.* Mobile, 62 Ala. 284.

[56] Citizens' National Bank *v.* Lofton, 85 Ind. 341.

that the shares of stock in national banks shall not be taxed at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of the State.[57]

(*m*) **Iowa.** — While the capital of national banks cannot be taxed by State authority, the shares of shareholders may be, in a rate not exceeding that imposed upon the shares of banks organized in and by authority of such State. But if the laws of the State merely provide for the taxation of the capital of its own banks, and not of the shares held therein, a subsequent or further provision for the taxation of the shares of national banks is not in conformity with, and is unauthorized by, the act of Congress providing for the organization of national banks, and is therefore invalid.[58]

Under section 41 of the act of June 3d, 1864, authorizing the organization of national banks, none of the property of such banks is taxable by State, county, or municipal authority, except the real estate of the bank, and the shares of its stockholders. The duties provided for in said act were designed to be in lieu of all existing taxes.[59]

(*n*) **Massachusetts.** — The bank shares of the estate of a deceased person must be assessed at the place where all the other property of the deceased is assessed. Under chapter 321 of the laws of 1872, the city of Boston had no right to assess any of the shares of such stock (the residence of the deceased having been in Canton) at the residence of the executor, or at the locality of the bank.[60]

Maryland. — By the provisions of its charter, a State bank was to pay twenty cents upon every one hundred dollars of stock paid in during the preceding year. In 1865 the bank surrendered its charter, and reorganized as a national bank. It was subsequently sued by the State for dues maturing after reorganization. Held, (1) that under the State law the bank had a right to surrender its charter; (2) that the bonus of twenty cents was a price paid for the right of exercising the

[57] Stiltz *v.* Interwiler, 1 Wilson, (Ind.) 507.

[58] Hubbard *v.* Board of Supervisors, 23 Iowa, 130.

[59] National State Bank *v.* Young, 25 Iowa, 311.

[60] Revere *v.* City of Boston, 5 Rep. (Mass.) 46.

powers and privileges of the charter, which, after its surrender, the State had no right to exact; (3) that after the reorganization as a national bank, the bonus could only be exacted as a tax, and that the State had no right to impose.[61]

Double taxation is unlawful; wherefore the realty *or* capital stock may be taxed, but not both.[62]

(*o*) **Minnesota.** — After the shares have been assessed without deducting the realty and the tax paid, the banking office and lot cannot be taxed to the bank.[63]

Missouri. — National banks derive their authority from the United States, and cannot be taxed in any way except as expressly authorized. The capital stock as such cannot be taxed, nor can a city exact a license fee from a national bank.[64]

(*p*) **New Hampshire.** — The surplus fund which a national bank was required by the United States General Statutes, § 5199, to reserve from its net profits, is not excluded in the valuation of its shares for taxation.[65]

New Jersey. — The restriction on the power of the States in the matter of taxation of national banks does not arise from the fact that they are created corporations under the act of Congress. The States may lawfully tax the property merely of a corporation created by act of Congress, in common with other property of the same description throughout the State.

(*q*) But to the extent that such property is invested in the securities of the Federal Government, it is beyond the power of the States to tax it against the corporation without permission of Congress, for the reason that taxation in that

[61] State *v.* National Bank of Baltimore, 33 Md. 75.

[62] County Commissioners of Frederick County *v.* Farmers & Mechanics' National Bank of Frederick, 48 Md. 117.

[63] Board of Commissioner of Rice County *v.* Citizens' National Bank, 23 Minn. 280.

[64] City of Carthage *v.* First National Bank of Carthage, 10 Rep. (Mo.) 469. See also Mayor of Macon *v.* First National Bank of Macon, 59 Ga. 648, and National Bank *v.* Mayor, 8 Heisk. 814.

[65] Stafford National Bank *v.* Dover, 58 N. H. 316.

respect would be, indirectly, a tax upon the credit and securities of the Federal Government.

The power of the States to tax, in the hands of stockholders, the stock of national banks which is invested in Federal securities is derived exclusively from the authority conferred by Congress. By the act of 1864, as amended in 1868, power is granted to the States to tax the shares of the stock of national banks by including them in the valuation of the personal property of the owner. The only restriction on this power of taxation is, that it shall not be at any greater rate than is assessed on other moneyed capital in the hands of individual citizens of the State, and that shares owned by non-residents of the State shall be taxed in the city or town where the bank is located. The mode in which the tax shall be assessed and collected, and the place where it shall be laid on resident stockholders, are left to the discretion of the legislatures of the States in which the banks are respectively located.[66]

But it was held in the Court of Appeals, that the resident stockholder had a right, under the laws of New Jersey, to have the shares of national bank stock standing in his name assessed to him in the township or ward in which he resides.[67]

(*r*) A national bank located in New Jersey had an office in Philadelphia, where deposits were received. Held, that said deposits were not liable to tax in Philadelphia.[68]

New York. — The act providing that the taxation of shares of stock of national banks "shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens" requires that no greater percentage of tax shall be levied; it does not apply to an over valuation. The fact that the capital of the bank is invested in United States securities does not prevent the taxing of the shares.

No deduction need be made for the debts of the owners of such shares.[69]

[66] State *v.* Newark, 39 N. J. (10 Vroom,) 380.
[67] State *v.* Newark, 40 N. J. (11 Vroom,) 558.
[68] National State Bank of Camden *v.* Pierce, 18 Alb. Law Jour. 16.
[69] Williams *v.* Weaver, 75 N. Y. 30.

The actual and not the par value is the standard of taxation in assessing shares of a national bank. The fact that the capital of the bank is invested in United States bonds does not affect the valuation. The actual value of the stock, diminished by the proportionate value of the real estate owned by the bank, furnishes the proper sum upon which to assess the tax.[70]

(*s*) **North Carolina.** — National bank shares may be assessed at the residence of the owners, or at the location of the bank, as the legislature of the State may determine.[71]

Pennsylvania. — A corporation, while in a transition state from its original character as a State bank to that of a national bank, is subject to State taxation.[72]

South Carolina. — There can be no increase of the capital of a national bank until the Comptroller approves thereof, and issues his certificate under the banking act, section 13. Until then, new shares are not taxable.[73]

Texas. — Under the laws in force in 1876, a national bank was not liable to pay State and county taxes for that year assessed on shares of stock in the bank not owned by it, but by individual shareholders.[74]

(*t*) **United States.** — Where a statute provides for the assessment of the shares of a corporation at "their full and true value," deducting the proportional value of the real estate owned by the corporation, the just assessment will include the surplus or undivided profits of the corporation.[75]

The taxing power, so far as it is reserved to the States, and used within constitutional limits, cannot be controlled or restrained by the United States courts, the prudence of its exercise not being a judicial question. But a State tax on the loans of the Federal Government is a restriction upon the constitutional power of the United States to borrow money, and

[70] People *v.* Commissioners, 8 Hun, 536.

[71] Borie *v.* Commissioners of Fayetteville, 75 N. C. 267.

[72] Commonwealth *v.* Manufacturers & Mechanics' Bank, 2 Pearson, (Pa.) 386.

[73] Charleston *v.* People's National Bank, 5 Rich. L. 103.

[74] Waco National Bank *v.* Rogers, 51 Texas, 606.

[75] People *v.* Commissioners, 4 L. & E. Rep. 213 (U. S. C. C.).

if the States had such a right, being in its nature unlimited, it might be so used as to defeat the Federal power altogether.

A tax on the nominal capital of a bank without regard to the nature or value of the property composing it, is annexed to the franchise as a royalty for the grant, and not a burden imposed on the property itself.[76]

A tax on the capital of a bank is not the same thing as a tax upon the shares of which the capital is composed. And when a State imposes on the State banks a tax on their *capital*, (the *shares* in the hands of the shareholders being exempt from taxation,) it cannot lay a tax on the shares of national banks.[77]

Under the Internal Revenue Act of July, 1870, interest paid and dividends declared during the last five months of the year 1870 are taxable, as well as those declared during the year 1871, it appearing that income of other sorts was meant to be so taxed, and there appearing to be no good reason why income derived through corporations should not be taxed like income generally.[78]

(*u*) Legal tender notes of the United States cannot be taxed in the hands of a bank. An interesting question under this rule arose in Louisiana; a bank had one million capital stock; it was assessed $200,000 on its real estate, and $700,000 on its capital or money at interest. The bank had three million more in deposits and other debts due from it. It had also $974,000 in legal tenders, and claimed that these were a part of its capital, and that therefore the $700,000 assessment was wrongful. The court said that the original capital was probably loaned out. The bank had notes and bills discounted to the amount of nearly two millions, and the legal tenders were just as applicable to its deposits and other obligations as to its stock, and the bank could not be allowed to say that they constituted its capital.[79]

[76] People *v.* Commissioners of Taxes, 2 Black. 620.

[77] Bradley *v.* The People, 4 Wall. 459.

[78] Blake *v.* National Banks, 23 Wall. 307.

[79] New Orleans Canal & Banking Co. *v.* City of New Orleans, 9 Otto, 97.

Shareholders in national banks may be taxed by the State laws at a greater rate than is assessed upon shareholders in other than moneyed corporations without violation of U. S. Rev. Sts. § 5219.[80]

The tax imposed by U. S. Rev. Sts. § 3413, on notes of a municipality held by any bank, is simply on their use as a circulating medium, and is constitutional.[81]

Where taxing officers have assessed national bank shares at full value, but other capital far below its true value, a court of equity will, on tender of the proper sum, enjoin the State authorities from collecting the remainder.[82]

Personal property of an insolvent national bank in the hands of a receiver appointed under U. S. Rev. Sts. § 5234, is exempt from State taxation.[83]

A city's assessment of the capital of a banking company was held lawful; the bank failing to show that the capital not invested in real estate consisted of United States legal tender notes.[84]

Certificates of indebtedness are not taxable as "circulation" under the U. S. Revised Statutes, unless intended to be used as money.[85]

(*v*) A *national* bank may, on behalf of its shareholders, bring a bill to enjoin the collection of taxes laid upon assessments made in violation of the U. S. Rev. Sts. § 5219, requiring the shares not to be assessed "at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens."[86]

A bill to enjoin a tax on national bank shares for *discrimination*, &c., must allege that the shares are valued higher than other moneyed *capital generally*, and it is not

[80] First National Bank of Utica *v.* Waters, 19 Blatchf. 242.

[81] Merchants' National Bank of Little Rock (Ark.) *v.* United States, 101 U. S. 1.

[82] Pelton *v.* Commercial National Bank of Cleveland, 101 U. S. 143.

[83] Rosenblatt *v.* Johnston, 104 U. S. 462.

[84] New Orleans Canal & Banking Co. *v.* New Orleans, 99 U. S. 97.

[85] United States *v.* Wilson, 106 U. S. 620.

[86] National Albany Exchange Bank *v.* Wells, 18 Blatchf. 478.

sufficient to allege that such is the fact in *particular instances*.[87]

Section 5219 of the U. S. Rev. Sts., protecting national banks from injurious discrimination, does not limit the standard of comparison to the "moneyed capital" invested in the "incorporated banks" of a State, but extends to all "moneyed capital in the hands of individual citizens of the State," and in order to compliance equalization must extend accordingly; and this although the bank shares are assessed *below* "their true value in money."[88]

If a dividend has been declared, the tax on dividends "declared . . . as a part of the earnings," &c. (Act of 1866, 14 U. S. Stat. at Large, 138) is assessable, although it appears afterwards that, owing to a defalcation, the dividend never was earned.[89]

The real, but not the personal, estate of a national bank may be subjected to a State tax.

The Kentucky tax of fifty cents a share on national bank stock includes the stockholder's interest in the surplus and undivided profits, as well as the authorized capital and assets.[90]

(*w*) Under 13 U. S. Stat. at Large, 283, §§ 120, 121, the duty of five per cent on bank dividends can be recovered only when sums alleged to be dividends have been declared as such, or have been added to the bank's surplus or contingent fund. *Where a dividend was declared in ignorance of losses* afterwards discovered, *these losses may be* estimated in determining the amount due the United States.[91]

Chapter 761 of the New York *Laws*, 1866, as to the tax on bank stock, *contravenes the act of Congress* thereon, so far as not permitting a stockholder of a national bank to

[87] Chicago Bank *v.* Farwell, 10 Bissell, 270.

[88] First National Bank of Toledo *v.* Lucas County Treasurer, 25 Fed. Rep. 749.

[89] United States *v.* Central National Bank, 24 Fed. Rep. 577.

[90] Covington City National Bank *v.* City of Covington, 21 Fed. Rep. 484.

[91] United States *v.* Central National Bank, 15 Fed. Rep. 222.

deduct the amount of his debts from the value while the *owner of other property can so deduct*. But the tax officers act within their authority until notified that he has such debts.[92]

The exemption from county taxation of property considerable in quantity and value, consisting of railroad securities, shares of stock in corporations liable to State taxation, mortgages, judgments, recognizances, money due on contracts for the sale of land, and corporation loans taxable by the State, constitutes an unlawful discrimination against national bank shares.[93]

.(*x*) The courts relieve from inequalities in the valuation of property for taxation only when it appears that there was an *intentional discrimination*, and not merely an error in judgment of the assessing officer.

Shares in national banks may be taxed at their *true money value*, both under United States and Ohio laws.

"*Other moneyed capital*," in U. S. Rev. Sts. § 5219, refers to other *taxable* moneyed capital.

Elimination from returns of unincorporated banks of *non-taxable securities* is no discrimination against holder of national bank shares.[94]

A bank may enjoin collection of a void tax on shares, though it has not been threatened by stockholders with suit if it pays; it is enough that payment would render it liable to such suit.[95]

(*y*) Mercantile Bank *v.* New York [96] is a very important case on this subject, and because it so clearly expounds the meaning of the term "moneyed capital," and the intent of Congress in limiting the power of State taxation, we give it at some length.

"The main purpose of Congress in fixing limits to State taxation on investments in shares of national banks was to render it impossible for the state in levying such a tax to

[92] Supervisors of Albany County *v.* Stanley, 105 U. S. 305.
[93] Boyer *v.* Boyer, 113 U. S. 689.
[94] Exchange National Bank *v.* Miller, 19 Fed. Rep. 372.
[95] Albany City National Bank *v.* Maher, 19 Blatchf. 175.
[96] Mercantile Bank *v.* New York, 121 U. S. 138.

create and foster an unequal and unfriendly competition, by favoring institutions or individuals carrying on a similar business, and operations and investments of like character.

"Section 5219 of the Rev. Sts. provides that such 'taxation shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State.' New York has by its legislation expressly exempted from all taxes in the hands of the individual citizens numerous species of moneyed capital, aggregating in actual value the sum of $1,686,000,000, whilst it has by its laws subjected national bank shares in the hands of individual holders thereof (aggregating a par value of $83,000,000), and State bank shares (having a like value of $22,815,700), to taxation upon their full actual value, less only a proportionate amount of the real estate owned by the bank. This exemption, it is claimed, is of a 'very material part relatively' of the whole, and renders the taxation of national bank shares void.

"The exemptions thus referred to are classified as follows: —

"1st. The shares of stock in the hands of the individual shareholders of all incorporated 'moneyed or stock corporations deriving an income or profit from their capital or otherwise, incorporated by the laws of New York, not including trust companies and life insurance companies, and State or national banks.' The value of such shares, it is admitted, amounts to $755,018,892.

"2d. Trust companies and life insurance companies. The actual value of the shares of stock in trust companies amounts to $32,018,900, and the actual value of the shares in life insurance companies amounts to $3,540,000, which life insurance companies, it is admitted, are the owners of personal property, consisting of mortgages, loans, stocks, and bonds, to the value of $195,257,305.

"3d. Savings banks and the deposits therein. The deposits amount to $437,107,501, and an accumulated surplus of $68,669,001.

"4th. Certain municipal bonds issued by the city of New York under an act passed in 1880, of the value of $13,467,000.

"5th. Shares of stocks in corporations created by States other than New York, in the hands of individual holders, residents of said State, amounting to $250,000,000.

"It is argued by the appellant that these exemptions bring the case within the decision of Boyer *v.* Boyer, 113 U. S. 689. In that case, referring to the legislation of Pennsylvania, it was said, 'The burden of county taxation imposed by the latter act has, at all events, been removed from all bonds or certificates of loan issued by any railroad company incorporated by the State; from shares of stock in the hands of stockholders of any institution or company of the State which in its corporate capacity is liable to pay a tax into the State treasury under the act of 1859; from mortgages, judgments, and recognizances of every kind; from moneys due or owing upon articles of agreement for the sale of real estate; from all loans, however made, by corporations which are taxable for State purposes when such corporations pay into the State treasury the required tax on such indebtedness.'

"In Lionberger *v.* Rouse, 9 Wall. 468, it was held that the proviso originally contained in the act of 1864, and omitted from the act of 1868, expressly referring to State banks, was limited to State banks of issue. The court said (p. 474), '*There was nothing to fear from banks of discount and deposit merely, for in no event could they work any displacement of national bank circulation.*' Of course, so far as investments in such banks are moneyed capital in the hands of individuals, they are included in the clause as it now stands.

"In the case of Hepburn *v.* School Directors, 23 Wall. 480, it was decided to be competent for the State to value, for taxation, shares of stock in a national bank at their actual value, even if in excess of their par value, provided thereby they were not taxed at a greater rate than was assessed upon other moneyed capital in the hands of individual citizens of the State. It was a further question in that case whether the exemption from taxation, by statute, of 'all mortgages, judgments, recognizances, and moneys owing upon articles of agreement for the sale of real estate,' made the taxation of shares in national banks unequal and invalid. This was de-

cided in the negative on the two grounds, 1st, that the exemption was founded upon the just reason of preventing a double burden by the taxation both of property and the debts secured upon it; and 2d, because it was partial only, not operating as a discrimination against investments in national bank shares. The court said, 'It could not have been the intention of Congress to exempt bank shares from taxation because some moneyed capital was exempt.' (p. 485.)

"The rule of decision in Van Allen *v.* Assessors, 3 Wall. 573, is not inconsistent with that followed in People *v.* Commissioners, 4 Wall. 244. In the former of these cases, the comparison was between taxes levied upon the shares of national banks and taxes levied upon the capital of State banks. In the valuation of the capital of State banks for this taxation, non-taxable securities of the United States were necessarily excluded, while in the valuation of shares of national banks no deduction was permitted on account of the fact that the capital of the national banks was invested in whole or in part in government bonds. The effect of this was, of course, to discriminate to a very important extent in favor of investments in State banks, the shares in which *eo nomine* were not taxed at all, while their taxable capital was diminished by the subtraction of the government securities in which it was invested, and against national bank shares taxed without such deduction at a value necessarily and largely based on the value of the government securities in which by law a large part of the capital of the bank was required to be invested. In the case of People *v.* Commissioners, the comparison was not between the taxation of shareholders in national banks and of shareholders in State banking institutions, but between the taxation of national bank shares and that of personal property held by individuals and insurance companies, from the valuation of which the deduction was permitted of the amount of non-taxable government securities held by them respectively.

"Shares of stock in railroad companies, mining companies, manufacturing companies, and other corporations, are represented by certificates showing that the owner is entitled to an interest, expressed in money value, in the entire capital and

property of the corporation; but the property of the corporation which constitutes its invested capital may consist mainly of real and personal property, which in the hands of individuals no one would think of calling moneyed capital, and its business may not consist in any kind of dealing in money, or commercial representatives of money.

"Whether property interests in railroads, in manufacturing enterprises, in mining investments, and others of that description, are taxed or exempt from taxation, in the contemplation of the law, would have no effect upon the success of national banks. There is no reason, therefore, to suppose that Congress intended, in respect to these matters, to interfere with the power and policy of the States. The business of banking, as defined by law and custom, consists in the issue of notes payable on demand, intended to circulate as money where the banks are banks of issue; in receiving deposits payable on demand; discounting commercial paper; making loans of money on collateral security; buying and selling bills of exchange; negotiating loans and dealing in negotiable securities issued by the government, State and national, and municipal and other corporations. These are the operations in which the capital invested in national banks is employed, and it is the nature of that employment which constitutes it in the eye of this statute 'moneyed capital.' Corporations and individuals carrying on these operations do come into competition with the business of national banks, and capital in the hands of individuals thus employed is what is intended to be described by the act of Congress. That the words of the law must be so limited appears from another consideration; they do not embrace any moneyed capital in the sense just defined, except that in the hands of individual citizens. This excludes moneyed capital in the hands of corporations, although the business of some corporations may be such as to make the shares therein belonging to individuals moneyed capital in their hands, as in the case of banks, a railroad company, a mining company, an insurance company, or any other corporation of that description, may have a large part of its capital invested in securities payable in money, and so may be the owners of moneyed capi-

tal; but, as we have already seen, the shares of stock in such companies held by individuals are not moneyed capital.

"The terms of the act of Congress, therefore, include shares of stock or other interests owned by individuals in all enterprises in which the capital employed in carrying on its business is money, where the object of the business is the making of profit by its use as money. The moneyed capital thus employed is invested for that purpose in securities by way of loan, discount, or otherwise, which are from time to time, according to the rules of the business, reduced again to money and reinvested. It includes money in the hands of individuals employed in a similar way, invested in loans, or in securities for the payment of money, either as an investment of a permanent character, or temporarily with a view to sale or repayment and reinvestment.

"Trust companies, however, in New York, according to the powers conferred upon them by their charters, and habitually exercised, are not, in any proper sense of the word, banking institutions. They have the following powers: to receive moneys in trust and to accumulate the same at an agreed rate of interest; to accept and execute all trusts of every description committed to them by any person or corporation, or by any court of record; to receive the title to real or personal estate on trusts created in accordance with the laws of the State, and to execute such trusts; to act as agent for corporations in reference to issuing, registering, and transferring certificates of stock and bonds, and other evidences of debt; to accept and execute trusts for married women in respect to their separate property; and to act as guardian for the estates of infants. It is required that their capital shall be invested in bonds and mortgages on unincumbered real estate in the State of New York worth double the amount loaned thereon, or in stocks of the United States, or of the State of New York, or of the incorporated cities of the State.

"It is evident, from this enumeration of powers, that trust companies are not banks in the commercial sense of that word, and do not perform the functions of banks in carrying on the exchanges of commerce.

"In the case of savings banks, we assume that neither the bank itself nor the individual depositor is taxed on account of the deposits. The language of the statute (§ 4, c. 456, Laws of 1857) is as follows: 'Deposits in any bank for savings, which are due to the depositors, . . . shall not be liable to taxation, other than the real estate and stocks which may be owned by such bank or company, and which are now liable to taxation under the laws of this State.'

"According to the calculation in this case, the deposits in such banks amount to $437,107,501, with an accumulated surplus of $68,669,001. It cannot be denied that these deposits constitute moneyed capital in the hands of individuals within the terms of any definition which can be given to that phrase; but we are equally clear that they are not within the meaning of the act of Congress in such a sense as to require that, if they are exempted from taxation, shares of stock in national banks must thereby also be exempted from taxation. No one can suppose for a moment that savings banks come into any possible competition with national banks of the United States. They are what their name indicates, banks of deposit for the accumulation of small savings belonging to the industrious and thrifty. To promote their growth and progress is the obvious interest and manifest policy of the State. Their multiplication cannot in any sense injuriously affect any legitimate enterprise in the community. We have already seen, that by previous decisions of this court it has been declared that 'it could not have been the intention of Congress to exempt bank shares from taxation because some moneyed capital was exempt' (Hepburn *v.* School Directors, 23 Wall. 480); and that 'the act of Congress was not intended to curtail the State power on the subject of taxation. It simply required that capital invested in national banks should not be taxed at a greater rate than like property similarly invested. It was not intended to cut off the power to exempt particular kinds of property, if the legislature chose to do so.' Adams *v.* Nashville, 85 U. S. 19. The only limitation, upon deliberate reflection, we now think it necessary to add, is that these exceptions should be founded upon just reason, and not operate as an un-

friendly discrimination against investments in national bank shares.

"It is further objected, on similar grounds, to the validity of the assessment complained of in this case, that municipal bonds of the city of New York to the amount of $13,467,000, are also exempted from taxation. The amount of the exemption in this case is comparatively small, looking at the whole amount of personal property and credits which are the subjects of taxation, — not large enough, we think, to make a material difference in the rate assessed upon national bank shares; but, independently of that consideration, we think the exemption is immaterial. Bonds issued by the State of New York, or under its authority by its public municipal bodies, are means for carrying on the work of the government, and are not taxable even by the United States, and it is not a part of the policy of the government which issues them to subject them to taxation for its own purposes. Such securities, undoubtedly represent moneyed capital, but as from their nature they are not ordinarily the subjects of taxation, they are not within the reason of the rule established by Congress for the taxation of national bank shares."

(*z*) A State's exemption from taxation to an amount greater than the capital stock of national banks, and of other "moneyed capital" in the hands of individual citizens, will not exempt national bank shares, under U. S. Rev. Sts. § 5219.[97]

McClain's Iowa Statutes, p. 319, providing for the taxing of savings banks by assessing the paid up capital, held not unconstitutionally discriminating against national banks, the shares of which are taxed.[98]

§§ 142, 143. **Voluntary Liquidation.**[1]—A national bank which has gone into voluntary liquidation becomes subject to like proceedings as domestic corporations; for instance, to a creditor's bill to reach a fund held by the president.[2]

[97] Boyer's Appeal, 103 Pa. St. 387.

[98] National Bank *v.* Board of Equalization, 64 Iowa, 140.

[1] §§ 142, 143. R. S. 5220. §§ 42, 43.

[2] Merchants & Planters' National Bank *v.* Trustees of Masonic Hall, 65 Ga. 603.

A national bank, the successor of one which went into liquidation, is liable for deposits therein.[3]

A bank resolved to liquidate, suspended business, deposited with the Treasurer money to redeem its circulation, and received its bonds by re-assignment. There was no actual or formal surrender of its franchises, nor any judicial dissolution, and it was held that the corporation was not dissolved.[4]

A national bank cannot be proceeded against under the Bankrupt Act. That act does not repeal or supersede the National Banking Law, and its provisions as to winding up national banks, which are exclusive. It would produce great confusion to hold that both acts apply to national banks.[5]

§ 144. **Change of a Pre-existing Corporation into a National Bank.**[1] — (*a*) A bank established under State laws, and reorganizing under the act of Congress as a national banking association, does not thereby lose any of the assets or escape any of the liabilities appertaining to it in its former character. It is not divested of its identity by a change which is a "transition and not a new creation." Therefore, where a special deposit has been made with the State institution, the national association will be under the same liability as was its predecessor to return it or to make good its value in damages.[2] And where the State bank had offered a reward, the national bank was held to payment thereof.[3]

(*b*) A guarantor was bound upon a continuing guaranty running to a State bank, which reorganized as a national bank. Held that the national bank might enforce the liability.[4]

(*c*) A national bank, organized as successor to a State bank, may foreclose a mortgage on real estate, which was given as

[3] Eans *v.* Exchange Bank of Jefferson City, 79 Mo. 182.

[4] Ordway *v.* Central National Bank of Baltimore, 47 Md. 217.

[5] In re Manufacturers' National Bank, 5 Biss. 499.

[1] § 144. R. S. 5154, 5155. §§ 44, 65.

[2] Coffey *v.* National Bank of the State of Missouri, 46 Mo. 140.

[3] Kelsey *v.* National Bank of Crawford, 69 Pa. St. 426; and see Maynard *v.* Bank, 1 Brewster, 483.

[4] City National Bank of Poughkeepsie *v.* Phelps, 86 N. Y. 484 (1881).

security for a note held by the State bank, both note and mortgage having been assigned, among the assets of the State bank, to the national bank.[5]

(*d*) A *national bank* in fact organized as the *successor* of a *State bank* may hold the assets of its predecessor, even though in form it was organized as a new bank.[6]

(*e*) A State bank paid its president money, which he falsely said he had paid its creditor. It became a national bank; the creditor recovered from the national bank. Held, that it could recover from the president the money had and received, although the State statute provided that the State bank should be continued for three years, to close its concerns.[7]

(*f*) One who at the time of the reorganization is a debtor of the State association, and also a holder of its bills, can compel the national bank, although insolvent, to receive these bills in payment of the debt. But *aliter*, where the debt ran originally to the national association, and was put in judgment, and the bills of the State bank were subsequently obtained by the debtor.[8]

(*g*) A testator owning stock in a State bank bequeathed it with the proviso that, if during the life of the legatee "the whole or any part of said stock shall be paid off and refunded, by the expiration of the charter, or from any cause whatsoever, then the amount so paid off and refunded shall be paid to," &c. The State bank afterwards became a national bank, and it was held, in a proceeding to test the title to the shares, that the conversion of the State bank into a national bank was not a paying off and refunding of the stock of the former.[9]

(*h*) Under the United States statute and the statutes of Massachusetts, a national banking association succeeds to the

[5] Scofield *v.* State National Bank of Lincoln, 9 Neb. 316; citing National Bank *v.* Mathews, 8 Otto, 621.

[6] Western Reserve Bank *v.* McIntire, 40 Ohio St 528.

[7] Atlantic National Bank *v.* Harris, 118 Mass. 147.

[8] Thorp *v.* Wegefarth, 56 Pa. St. 82.

[9] Maynard *v.* Bank, 1 Brewster, 483; and see Kelsey *v.* National Bank of Crawford, 69 Pa. St. 426.

rights of action of its predecessor, the State corporation, and may bring suit thereon in its own name.[10]

(*i*) The Grocers' Bank, established under State laws, reorganized as the Grocers' National Bank, under the act of Congress. When the Grocers' Bank ceased to exist, it had a right of action against an officer for fraudulent misapplication of its assets. Held, that this right of action was a part of the assets of the State association, and, as such, passed to the national association, and might be prosecuted by it.[11]

(*j*) Where a State enactment made subsequent to the National Banking Act authorizes a State bank to reorganize as a national bank, but under the condition that it shall continue to pay a certain bonus to the State, in accordance with a stipulation imposed by its State charter, such tax cannot afterward be recovered from the national association, on the ground of an implied contract. The State has no power thus to intermeddle, and subject the new association to a burden of this character.[12]

(*k*) The bank does not have to get the consent of the State to such a change. Congress was as competent to authorize such a transformation as to create anew.[13]

The personal property of the old bank passes to the new, on execution of the papers necessary to the change from a State to a national bank, and approval by the proper officer. No other assignment is necessary.[14]

The new bank may, under a State statute, bring suit in the old name, upon a judgment obtained in that name.[15]

A note taken by the new bank from the old, among the discounted notes, is not itself, nor is any renewal of it, within the meaning of § 5200, as given for money borrowed of a national bank.[16]

[10] Atlantic National Bank *v.* Harris, 118 Mass. 147.
[11] Grocers' National Bank *v.* Clark, 48 Barb. 26.
[12] State *v.* National Bank of Baltimore, 33 Md. 75.
[13] Casey *v.* Galli, 94 U. S. 673.
[14] Watriss *v.* First National Bank of Cambridge, 124 Mass. 571.
[15] Thomas *v.* Farmers' National Bank, 46 Md. 43.
[16] Allen *v.* First National Bank of Xenia, 23 Ohio St. 97.

§ 145. **Deposits by the United States.**[1]—Where public moneys are deposited in a national bank, the same relation exists between the bank and the United States as would exist between the bank and a depositor of private moneys. The bank does not become by such deposit an agent of the United States so as to render the government liable for the money deposited in case of the failure of the bank.[2]

All national banking associations designated for that purpose by the Secretary of the Treasury shall be depositaries of public money, except receipts from customs, under such regulations as may be prescribed by the Secretary; and they may also be employed as financial agents of the Government; and they shall perform all such reasonable duties, as depositaries of public moneys and financial agents of the Government, as may be required of them. The Secretary of the Treasury shall require the associations thus designated to give satisfactory security, by the deposit of United States bonds and otherwise, for the safe keeping and prompt payment of the public money deposited with them, and for the faithful performance of their duties as financial agents of the Government. And every association so designated as receiver or depositary of the public money shall take and receive at par all of the national currency bills, by whatever association issued, which have been paid into the Government for internal revenue, or for loans or stocks.[3]

§§ 146–152. **General Provisions as to Insolvent Banks.**[1] — The provisions contained in the National Banking Act for the winding up of an insolvent bank have been held not to be superseded by the subsequent passage of the Bankrupt Act, but to remain in full and exclusive force; so that the national banks cannot either be thrown into bankruptcy involuntarily, or avail themselves of it voluntarily. The Federal courts have no power to declare such banks to be bankrupt.[2]

[1] § 145. R. S. 5153. § 45. [3] 3 June, 1864, c. 106, § 45.

[2] Branch *v.* The United States, 12 Bank. Mag. 61; Thompson's Nat. Bank Cas. 363.

[1] §§ 146–152. R. S. 5226–5238, 5242. §§ 46–52.

[2] In re Manufacturers' National Bank, 5 Biss. 499.

Where those circumstances exist which the act of Congress makes necessary for authorizing the Comptroller of the Currency to declare a bank insolvent, and proceed to wind it up, the provisions of the act must of course be followed. But in the absence of those contingencies which the act enumerates as giving such authority to the Comptroller in respect of the affairs of an insolvent bank, it appears that any court, otherwise of competent jurisdiction, is not prevented by the statute from acting in the ordinary manner, as in the case of any other insolvent corporation. It may, upon a bill in equity properly framed, appoint a receiver, and invest him with the customary functions of the office.[3] Also it has been said, more generally, that, when the Comptroller has taken no steps towards appointing a receiver, a court of equity is not barred by the statute from making such appointment at the instance of a judgment creditor.[4]

A creditor of an insolvent national bank cannot sue the receiver, since the only duty of that officer is to turn over the assets to the Comptroller of the Currency. The Comptroller may be reached by proceedings seeking a proper distribution of the fund in his hands; but an action of assumpsit will not lie against him. In this latter form, the suit must be brought against the bank, which is continued in existence for the purpose of being sued.[5]

The meaning of the word "insolvency" in the fifty-second section of the act of 1864, is the same as in the Bankrupt Act, and means a present inability to pay in the ordinary course of business.[6]

Under section 50 of the National Banking Act, which authorizes receivers to compromise doubtful debts "on the order of a court of record of competent jurisdiction," a District Court

[3] Irons *v.* Manufacturers' National Bank, 6 Biss. 301.

[4] Wright *v.* Merchants' National Bank, 3 Cent. Law Jour. 351; Thompson's Nat. Bank Cas. 321.

[5] Bank of Bethel *v.* Pahquioque Bank, 14 Wall. 383; Chemical National Bank *v.* Bailey, 12 Blatchf. 480; see *post*, § 150 *a*, "Suits against a Receiver."

[6] Case *v.* Citizens' Bank of Louisiana, 2 Woods, 23.

of the United States is within the requirements of the statute, and may make an order of compromise.[7]

A bill brought by the assignee of bonds deposited by a national bank with the Treasurer of the United States, in order to procure circulating notes, cannot be maintained where the receiver of such bank is made a party defendant to the bill, and it is prayed that his appointment be decreed null and void, unless it is clearly shown by the complaint that the receiver has an interest in the subject matter of the bonds, and is acting in derogation of the plaintiff's rights.[8]

Moreover, if the plaintiff and receiver are citizens of the same State, the title to the bank's residuary interest in the bonds is not a question within the jurisdiction of a United States Circuit Court.[9]

A creditor of an insolvent national bank, who establishes his debt by suit and judgment after the Comptroller's refusal to allow it, is entitled to share in dividends upon the debt and interest so established, as of the day of the failure of the bank; and not upon the basis of the judgment, if it includes interest after that date.[10]

A return of *nulla bona* upon an execution against a bank is ample evidence of its insolvency.[11]

§ 150 A. **Appointment of Receiver, &c.** — His appointment does not dissolve the bank, and the bank and receiver can both be made defendants.[1]

As soon as appointed, the bank and all its assets, books, and papers pass into his hands, and neither directors nor other officers have any rights in the premises.[2]

The receiver is the one to be sued to recover the value of special deposits lost by the bank before its failure.[3]

[7] Petition of Platt, 1 Bened. 534.

[8] Van Antwerp *v.* Hulburd, 8 Blatchf. 282; and see Same *v.* Same, 7 Blatchf. C. C. 426.

[9] Hall, J., 8 Blatchf. 282.

[10] White *v.* Knox, 111 U. S. 784.

[11] Wheelock *v.* Kost, 77 Ill. 296.

[1] § 150 A. Green *v.* Walkill National Bank, 7 Hun, 63.

[2] Bank of Bethel *v.* Pahquioque Bank, 14 Wall. 383.

[3] Turner *v.* First National Bank of Keokuk, 26 Iowa, 562.

So a suit for damages by misconduct of officers before failure may be brought against the receiver as sole defendant.[4]

The receiver may buy real estate through a trustee to save a debt due the bank.[5]

The Statute of Limitations begins to run when the receiver is appointed; and if the Comptroller's order of assessment is more than six years after such appointment, the claim is barred.[6]

The receiver has no greater rights in enforcing the collection of the bank's assets than the bank itself.[7]

"Under the direction of the Comptroller," means that the receiver is subject to orders; but he may act in the absence of orders; it is his duty to collect the assets.[8]

The receiver represents, not the Government, but the bank, stockholders, and creditors, and he cannot subject the Government to the jurisdiction of the courts by answering for it.[9]

The decision of a receiver on a claim is not final; the creditor may after his disallowance sue the bank.[10]

A receiver is an officer of the United States, and as such may sue at common law in the District Courts.[11]

The receiver may apply to the District Court where the bank is located for authority to compromise a doubtful debt.[12]

§ 150. **Suits by a Receiver.**[1]—The receiver may bring a suit to recover an ordinary debt of the bank, without being directed so to do by the Comptroller of the Currency. For his very appointment makes it his duty to collect the assets and debts of the association; neither in such an instance is any unusual exercise of judgment required.[2] But he cannot institute suits

[4] Case *v.* Bank, 100 U. S. 446.
[5] Zantzingers *v.* Gunton, 19 Wall. 32.
[6] Price *v.* Yates, 19 Alb. Law Jour. 295.
[7] Casey *v.* Credit Mobilier, 2 Woods, 77.
[8] Bank *v.* Kennedy, 17 Wall. 22.
[9] Case *v.* Terrell, 11 Wall. 199.
[10] Pahquioque Bank *v.* Bethel Bank, 36 Conn. 325.
[11] Platt *v.* Beach, 2 Ben. 303.
[12] Matter of Platt, 1 Ben. 534.
[1] § 150. R. S. 5234. § 50.
[2] Bank *v.* Kennedy, 17 Wall. 19.

against the shareholders for the purpose of enforcing their personal liability to contribution, unless he shall have been first instructed so to do by the Comptroller. For he has not knowledge of the facts requisite to enable him to form a proper judgment concerning the necessity for, or the propriety of, such action; neither is it intended that this question should depend upon the discretion of any other or lower officer than the Comptroller.[3]

A receiver appointed under the currency act to wind up the affairs of an insolvent national bank is an officer of the United States, and is therefore competent to maintain a suit in any District or Circuit Court of the United States.[4]

The receiver may bring suits either in his own name, as receiver, or in the name of the insolvent association.[5]

The debtors of a bank, when sued by a receiver, cannot inquire into the legality of his appointment. It is sufficient for the purposes of such a suit that he has been appointed and is receiver in fact, the action of the Comptroller in making the appointment being conclusive as to all debtors.[6] The bank, however, may move to set aside the appointment, and of course, if the motion be successful, the debtors may thereafter take advantage of this result.[7]

The power conferred on a national bank receiver by the act of Congress of 1864, "to collect all debts due such bank," imports power to adopt the necessary means to attain the object, including authority to sue and stand in judgment in the courts of the country in all cases involving such collection.[8]

The receiver may bring suit at law or in equity, and he may sue in his own name or in the name of the bank, although the act does not in terms give him authority to sue in his own name.[9] Pending a bill filed to enforce the liability of the

[3] Ibid.; Kennedy *v.* Gibson, 8 Wall. 498.

[4] Platt *v.* Beach, 2 Ben. 303.

[5] Kennedy *v.* Gibson, 8 Wall. 498; Bank *v.* Kennedy, 17 id. 19; Casey *v.* Galli, 94 U. S. 673.

[6] Cadle *v.* Baker, 20 Wall. 650; Platt *v.* Beebe, 57 N. Y. 339.

[7] Cadle *v.* Baker, 20 Wall. 650.

[8] Case *v.* Berwin, 22 La. An. 321.

[9] Bank of Bethel *v.* Pahquioque Bank, 14 Wall. 383

shareholders of a national bank, a receiver appointed by the Comptroller cannot maintain a suit at law to enforce the liability of an individual shareholder.[10]

(*a*) **Suits against a Receiver.**[11] — An extraordinary attempt was made in the Circuit Court in Louisiana to bring the United States into the suit as a defendant, not indeed by name, but for all practical purposes. A bill in equity made the receiver of the insolvent bank and the Comptroller of the Currency of the United States parties defendant, and prayed that a certain admitted debt due to the bank from the United States be ascertained; that the United States be charged with and required to account for certain sums; and that the Comptroller should be enjoined from making a dividend until the account should have been adjusted. The lower court actually rendered a decree against the United States for a certain sum, and directed that no claim of the United States should have any preference in the distribution of the corporate assets except as to the bonds pledged to secure circulation. The Supreme Court of the United States, in setting aside this decree, remarked that the receiver "represents the bank, its stockholders and its creditors, and does not in any sense represent the Government; also that no such authority can be conceded to the Comptroller; that it may well admit of doubt whether, in the exercise of duties specially confided to him by act of Congress, he can submit himself to the control of the courts, especially of those which can assert no such jurisdiction by reason of their territorial limits; but that, without discussing how far he may thus submit to the courts, and consent to be governed in his official action by their decrees, so far as these affect parties impleaded in the same suit, it is certain that he cannot subject the United States to such jurisdiction, nor submit the rights of the government to litigation in any court.[12]

Even after the appointment of a receiver the bank itself continues to exist, and a suit may be instituted against it in its corporate name and character.[13]

[10] Hervey *v.* Lord, 11 Biss. 144.

[11] R. S. 5234. § 50.

[12] Case *v.* Terrell, 11 Wall. 199.

[13] Security Bank of New York *v.* National Bank of the Commonwealth,

The receiver cannot be compelled to pay the costs of a suit against his bank, which was put into judgment before his appointment; because he is not a party to the record, is not an officer of the court, and is bound to pay all the money he receives into the United States treasury.[14]

As soon as a receiver is appointed, it is his duty to interpose in pending suits, and take any steps necessary to remove existing liens. He may claim the property of the bank as against an attachment issued after the bank became insolvent, although prior to his appointment.[15]

Suit cannot be brought against the receiver in the United States courts by a party residing in the same district with him.[16]

Under the U. S. Rev. Sts. § 5234, a stockholder cannot maintain an action against the directors and receiver of a national bank for misconduct, &c., until the Comptroller of the Currency has refused to direct the receiver to sue; and the complaint must allege a demand upon the Comptroller accordingly.[17]

It seems that an improper refusal by the Comptroller would authorize the stockholders to sue in a State court, making the corporation or its representative a defendant.[17]

(*c*) **Distribution of Assets of Insolvent Bank.**[18]—The provisions of the act concerning the distribution of the assets of an insolvent bank are said clearly to manifest a design on the part of Congress, 1st, to secure the government for the payment of the circulating notes of the bank, not only by requiring in advance of the issue of such notes a deposit of the bonds of the United States, but further by giving to the government a first lien for any deficiency that may arise on all the assets

4 Thomp. & C. 518; Bank of Bethel *v.* Pahquioque Bank, 14 Wall. 383; Chemical National Bank *v.* Bailey, 12 Blatchf. 480; Green *v.* Walkill National Bank, 7 Hun, 63.

[14] Ocean National Bank *v.* Carll, 7 Hun, 237.

[15] National Bank *v.* Colby, 21 Wall. 609.

[16] Van Antwerp *v.* Hulburd, 8 Blatchf. 282.

[17] Brinkerhoff *v.* Bostwick, 23 Hun, 237.

[18] R. S. 5236. § 50.

subsequently acquired by the insolvent bank; and, 2d, to secure the residue of the assets of the bank for ratable distribution among its general creditors. This lien of the government continues to exist until the United States has been fully reimbursed for all sums paid out by it for the redemption of the notes of the bank, and it cannot be defeated by any proceedings in the nature of an attachment on the part of any other creditor. Neither can any such attachment operate to give the attaching creditor any preference over other private creditors, since the acquisition of such preference would defeat the intended ratable distribution among all creditors alike. Any suit which has been begun against the bank abates by virtue of the decree forfeiting the rights, privileges, and franchises of the association. Any attachment made in any such suit becomes at the same time necessarily altogether ineffectual and void. By the forfeiture the corporation is necessarily dissolved. Its existence as a legal entity is thereupon ended; it is a defunct institution, against which judgment can no more be rendered in a suit previously begun than judgment could be rendered against a dead man who has died *pendente lite*.[19]

Under the currency act the United States has a first and permanent lien upon all the assets of a national bank to the amount expended in paying the circulating notes of such association, and therefore the rights of an ordinary attaching creditor will be postponed to this paramount privilege.[20]

Section 50 of the National Banking Act requires the Comptroller of the Currency to apply the moneys paid over to him by the receiver of an insolvent bank "on all such claims as may have been proved to his satisfaction, or adjudicated in a court of competent jurisdiction." It has been held that, under this section, claims which have been proved to the satisfaction of the Comptroller are equivalent in all respects to claims which have been put in judgment. Accordingly, a depositor who has demanded payment of his deposit and has been refused is entitled to claim, not only the principal of the deposit,

[19] National Bank *v.* Colby, 21 Wall. 609.

[20] Schmidt *v.* The First National Bank of Selma, 22 La. An. 314.

but interest thereon from the time of the demand.[21] In the cited case, the principal was paid in full, but by instalments, and the demand for interest was refused, on the supposition on the part of the Treasurer that the creditor was not entitled to it. But the court having, as already stated, ruled otherwise, it was further held that the plaintiff was entitled to interest, to be reckoned from the date of payment of the last instalment upon the aggregate amount of interest which ought then to have been paid to him.

If the depositor makes no demand for payment, interest will be calculated and allowed from the date when the Comptroller declares the bank in default and appoints a receiver.[22]

In another case of like purport, Wallace, J. held that creditors were entitled to receive interest on their demands during the period of the receiver's administration of the affairs of the insolvent bank, before any surplus in his hands could become properly distributable to shareholders. "The equity," he said, "of the creditors to receive interest on their claims for the time during which they have been precluded from receiving their principal, is obvious."[22]

It was decided by Cole, J., that, under section 50 of the Currency Act, the assets of a national bank, "in the hands of the receiver, or when reduced to money and placed subject to the order of the Comptroller, are to be ratably divided and appropriated to the payment of all legal liabilities of the association, whether such liabilities are debts, technically so called, or result from the nonfeasance or malfeasance of the association in respect of its binding obligations and duties"; and the receiver, being the active agent or fiduciary, may be made a party defendant to proceedings for the adjudication of a claim.[23]

A State court has no jurisdiction of the receiver of a national bank where he has not been made a party to the record, nor can such court force him to pay out moneys in satisfaction

[21] National Bank of Commonwealth *v.* Mechanics' National Bank, 94 U. S. 437.

[22] Chemical National Bank *v.* Bailey, 12 Blatchf. 480.

[23] Turner *v.* The First National Bank of Keokuk, 26 Iowa, 562.

of a judgment against the bank which was recovered before his appointment, since the receiver's duty is to pay all such moneys into the United States treasury.[24]

Authority to a receiver to sell assets in such manner as he deems best for the interest of all concerned, is not authority to exchange or barter assets.[25]

The United States has a prior lien over other creditors on the proceeds of the sale of bonds deposited as security for the circulation of national bank bills, as well as a prior claim in the distribution of the bank's assets for the payment of claims of the Government against such bank, and may apply the proceeds of such assets to the payment of its claim, *pro tanto*, for postal funds or money order funds deposited in such bank by the local postmaster.[26] U. S. Rev. Sts. § 5236, does not repeal this priority.[27] A bank, while engaged in business, pledged certain notes constituting a part of its assets to a creditor to secure indebtedness to him. The bank afterward failed, and the receiver brought an action to recover the notes. Held, that he could not recover the notes until the whole indebtedness was paid.[28]

A claim approved by the Comptroller, or put in judgment, bears interest[29] from the time it is approved or entered, if the assets pay the claims in full, and this interest is to be paid by the Comptroller before distributing the surplus among the stockholders.[30]

A claim for damages by reason of failure of the bank to deliver a special deposit is upon the same plan as other debts. The assets in the hands of the receiver are to be ratably divided to pay all legal liabilities of the bank, whether debts *strictu sensu*, or claims arising from nonfeasance or malfeasance.[23]

[24] Ocean National Bank *v.* Carll, 7 Hun, 237.

[25] Ellis *v.* Little, 27 Kans. 707.

[26] United States *v.* Cook County National Bank, 11 Leg. News, 344.

[27] United States *v.* Cook County National Bank, 9 Biss. 55.

[28] Casey *v.* Credit Mobilier, 7 Leg. News, 313; s. c. 2 Woods, 77.

[29] National Bank of Commonwealth *v.* Mechanics' National Bank, 9 Leg. News, 269; affirmed 94 U. S. 437.

[30] Chemical National Bank *v.* Bailey, 12 Blatchf. 480.

A plaintiff must make out a very clear equity before the court will allow him to be paid in full; in case of an insolvent bank.[31]

(*d*) **Liability of Shareholders in Insolvent Banks.**[32] — The decision of the Comptroller as to a deficiency of assets is final, and cannot be questioned by a shareholder in a suit instituted against him to recover the amount assessed to be paid by him.[33] Neither can the shareholder plead *nul tiel corporation*, nor seek to go behind the Comptroller's certificate for the purpose of showing any description of precedent irregularity in the proceedings.[34] A stockholder who has shared in the transactions of a *de facto* national bank, and has received dividends on his shares, being sued for his assessment, is estopped to deny the legality of the incorporation.[35]

Where the Comptroller of the Currency assesses the shareholders in an insolvent national bank for the purpose of paying the debts of the bank, the sums assessed become payable immediately upon the making of the order, and interest may be computed from that date in all cases of delay in payment.[36]

Where the Comptroller of the Currency has declared a national bank to be insolvent, and has assessed the amount payable by the shareholders in respect of their shares, the liability of each shareholder to pay the amount due upon his shares is several, and collection of the amount may be made by a suit at law against him individually.[37]

Where a person holds shares in a national bank simply as collateral security for a loan, but nevertheless appears upon the books of the association as the absolute and legal owner, his liability to assessment, in the event of the bank

[31] In re Bank of Madison, 5 Biss. 515.

[32] See §§ 101, 102.

[33] Ocean National Bank *v.* Carll, 7 Hun, 237.

[34] Casey *v.* Galli, 94 U. S. 673.

[35] Wheelock *v.* Kost, 77 Ill. 296.

[36] Casey *v.* Galli, 94 U. S. 673, overruling Bowden *v.* Morris, 1 Hughes, 378.

[37] Bailey *v.* Sawyer, Thompson's Nat. Bank Cas. 356.

becoming insolvent, is the same as that of any ordinary shareholder.[38]

The pledgee, having under the contract a right to sell the shares, may do so though he believes the bank to be insolvent, and his real motive in selling is to escape liability. The sale is not in fraud of creditors of the bank by reason of the existence of any such belief and motive in the mind of the vendor.[39] But where the vendor was an officer of the bank, cognizant of its condition, and the transfer was apparently made without consideration and to a person of no financial responsibility, a contrary rule was laid down, and the transfer was held to be in fraud of creditors and void.[40]

§ 152. Preferences.[1] — Under section 52 of the act of 1864, a transfer of property made by a national bank to a creditor, the bank being already insolvent or in contemplation of insolvency, is void only when made for the purpose of preventing the distribution of the assets of the bank among its creditors, in accordance with the provisions of the act. Whence it follows that, if the transfer be based upon a sufficient consideration moving from the transferee to the bank contemporaneously with the transfer, the transaction is legal. It is only the paying or securing pre-existing debts that is illegal.[2]

In the cited case, a national bank, financially embarrassed, had deposited a part of its assets with a certain firm as security for a loan advanced at the same time by a third party; the president of the bank was a member of the firm. The court held the transaction legal, since the firm held the position simply of depositaries or stakeholders; also because in this case the directors had ratified the action of the president, though taken by him in the first instance without authority from them.

[38] Wheelock *v.* Kost, 77 Ill. 296; Magruder *v.* Colston, 44 Md. 349; Hale *v.* Walker, 31 Iowa, 344.

[39] Magruder *v.* Colston, 44 Md. 349.

[40] Bowden *v.* Santos, 1 Hughes, 158.

[1] § 152. R. S. 5242. § 52.

[2] Casey *v.* Credit Mobilier, 2 Woods, 77.

It is unnecessary that the insolvency of the bank should be in the contemplation of the transferee.[3]

The bank advanced to H., who was a banker, the sum of $10,000, less the usual charge of one eighth of one per cent. On the afternoon of the same day, H. placed certain securities in an envelope accompanied by a note, saying, "A disappointment gives us reason to fear that our check of this date may not be paid. I leave with you the enclosed as security." Held, that the securities were transferred with a view to give a fraudulent preference, and that the bank had reasonable cause to believe that H. was insolvent when it received and appropriated the securities presented to it.[4]

The bank, after knowledge of his insolvency, took from the debtor a note with power of attorney to confess judgment, on which it entered a judgment on the next day, and levied upon and sold the property of the debtor to satisfy the same. The assignee in bankruptcy of the debtor brought suit to recover the money. Held, that the act constituted a fraudulent preference. Also held, that the receipt of moneys by the bank in collections for the debtor, which were by it turned over to the sheriff to be levied upon, was a fraudulent preference, and did not raise the question of set-off. Also held, that the taking a check from the bankrupt, and crediting the amount of the check then on deposit on the bankrupt's note the day before taking judgment, was a payment by way of preference, and therefore void, and did not raise the question of set-off.[5]

When a national bank becomes insolvent, the rights and liabilities between itself and its creditors are fixed at the appointment of a receiver, and no lien can be created, or right or preference obtained afterward.[6]

An attachment against an insolvent national bank, invalid under U. S. Rev. Sts. § 5242, is not rendered valid by its subsequent acquisition of further capital.[7]

[3] Case *v.* Citizens' Bank of Louisiana, 2 Woods, 23.

[4] Merchants' Nat. Bank *v.* Cook, 10 Leg. News, 82; s. c. 95 U. S. 342.

[5] Traders' Bank *v.* Campbell, 14 Wall. 87.

[6] Balch *v.* Wilson, 25 Minn. 299.

[7] Raynor *v.* Pacific National Bank of Boston, 93 N. Y. 371.

U. S. Rev. Sts. § 5242, prohibiting attachments against insolvent national banks, was not intended to protect the receiver's custody of property not owned by the bank.[8] See § 157 *a*.

§ 153. **Liability of Directors.**[1] — U. S. Rev. Sts. § 5239, applies only to violations of the act itself, by the assumption on the part of directors of powers in excess of the corporate franchises, or by a disregard of the prohibitions contained in the act.[2]

§ 156. The provision[1] as to the conduct of suits by district attorneys is so far directory that stockholders cannot set it up to defeat a suit conducted by private counsel employed by a receiver with the approval of the Treasury Department.[2]

§ 157. **Jurisdiction of National and State Courts.**[1] — In questions which have arisen as to jurisdiction, and in what courts a national banking association may properly appear as a party in a cause, it has been declared that the bank is to be regarded as located in the place specified in its certificate of organization, and its corporators will be assumed to be citizens of the State in which such place is situated. The effort was made to argue that, since the incorporation was under national legislation, the only inference which could be drawn from it was that the corporators were citizens of the United States. But the court ruled otherwise, preferring the presumption as to habitat as above stated. Accordingly it was held that a national bank could bring a suit in a Circuit Court of the United States, sitting in another State, against a defendant who was a citizen of such other State.[2] Also a national bank has the right of a citizen in the State wherein

[8] Corn Exchange Bank of Chicago *v.* Blye, 101 N. Y. 303.

[1] § 153. R. S. 5239. § 53.

[2] Brinckerhoff *v.* Bostwick, 88 N. Y. 52.

[1] § 156. R. S. 380. § 56.

[2] Kennedy *v.* Gibson, 8 Wall. 498.

[1] § 157. R. S. 563 (15), 629 (10, 11). §§ 57, 82, 70. See Usury, § 130 *m*. See § 108 *f*.

[2] Manufacturers' National Bank *v.* Baack, 8 Blatchf. 147; 2 Abb. (U. S.) 232; Davis *v.* Cook, 9 Nev. 134.

it is located, and as such may insist upon the removal of a cause from a State to a National court.[3]

It has, however, been said that the receiver of a national bank has not a prerogative right to be sued in the United States courts, and therefore an order made only upon the ground of such a prerogative right for the removal of a suit against a receiver from a State into a Federal court will be vacated.[4]

A national bank derives its right to sue from the Currency Act of 1864, and not from the Judiciary Act; whence it follows that the eleventh section of the Judiciary Act, limiting the jurisdiction of the Federal courts as to suits brought in behalf of an assignee on promissory notes and other choses in action, does not affect the right of a national bank to sue in the United States Circuit Court.[5]

"The 59th section of the act of February 25th, 1863, provides that all suits *by* or *against* such associations may be brought in the proper courts of the United States or of the State. The 57th section of the act of 1864 relates to the same subject, and revises and enlarges the provisions of the 59th section of the preceding act. In the latter, the word *by* in respect to such suits is dropped. The omission was doubtless accidental. It is not to be supposed that Congress intended to exclude the associations from suing in the courts where they can be sued. The difference in the language of the two sections is not such as to warrant the conclusion that it was intended to change the rule prescribed by the act of 1863. Such suits may still be brought by the associations in the courts of the United States. If this be not the proper construction while there is provision for suits *against* the associations, there is none for suits *by* them in any court."[6]

[3] Chatham National Bank *v.* Merchants' National Bank, 4 Thomp. & C. 196.

[4] Bird's Executors *v.* Crockrem, 2 Woods, 32.

[5] Commercial Bank of Cleveland *v.* Simmons, 10 Alb. Law Jour. 155.

[6] Kennedy *v.* Gibson, 8 Wall. 498; Manufacturers' National Bank *v.* Baack, 8 Blatchf. 147; s. c. 2 Abb. (U. S.) 232; Main *v.* Second National Bank, 6 Biss. 26.

A national bank can be sued as defendant in a District Court of the United States only when the bank is "located" or "established" within the district over which such court has jurisdiction. The fact that service of process is effected upon an officer of the bank within such district does not suffice to confer jurisdiction upon the court. The corporation is not "found" within the district because one of its officers is found there, so as to bring it within the meaning of section 11 of the Judiciary Act of 1789.[7]

But a national bank is not compelled to have recourse to the forum of the national courts. It has the same right as any other person or corporation to appear as plaintiff in the State courts, if it see fit so to do.[8] It may also be sued in the courts of the State in which it is located.[9]

It has been held in New York that section 57 of the act of 1864 does not modify or control section 8, and that consequently a national bank may be sued in the State courts of a State other than that in which it is situated.[10]

This, however, cannot be considered to be the law, inasmuch as the Supreme Court of the United States has asserted the contrary doctrine.[11] So also has Judge Blatchford, adding that jurisdiction cannot be conferred upon the State court even by the appearance of the defendant, and waiver on his part of all objection on the ground of lack of jurisdiction.[12]

It has been held in Massachusetts, in construing the same sections, that the intention of Congress is manifest that a banking association organized under the act can be "sued, either in the Federal or in the State courts, only in the judicial district in which it is established, and in which its officers may be summoned and its books brought into court with the least

[7] Main *v.* Second National Bank, 6 Biss. 26.

[8] First National Bank of Montpelier *v.* Hubbard, 49 Vt. 1.

[9] Adams *v.* Daunis, 29 La. An. 315.

[10] Cooke *v.* State National Bank of Boston, 50 Barb. 339, affirmed 52 N. Y. 96.

[11] Bank of Bethel *v.* Pahquioque Bank, 14 Wall. 383.

[12] Cadle *v.* Tracy, 11 Blatchf. 101.

interruption and inconvenience to its business; and that the election of the plaintiffs to sue in any court whatever should be confined within these limits in all cases." [13]

In Connecticut it has been held that section 57 does not confer upon a State court jurisdiction over an information in the nature of a *quo warranto* to try the right to office of a director in a bank organized under the act of 1864.[14]

Under the New York statutes, a national bank located in another State cannot keep an office in New York for the purpose of discount and deposit, and therefore there can be no recovery in the courts of New York upon paper discounted at such an office in violation of the statutes.[15]

Section 57 of the act of 1864 and the amendment by section 2 of the act of 1873 (ch. 269) are constitutional, as being a provision tending to promote the efficiency of the national banks by protecting them against suits and proceedings in State courts, whereby that efficiency might be impaired.[16]

A District Court of the United States is a "court of record of competent jurisdiction," within the meaning of section 50 of the act of 1864.[17]

A national bank must give security for payment of the costs of a suit instituted in a State court, when a statute of the State requires "a foreign corporation created by the laws of any other State or country" to give such security.[18]

A receiver of an insolvent national bank may sue in the Federal court of the district in which the bank was situated, against citizens of the same State, shareholders in the bank, to recover assessments due from them.[19]

The Federal Circuit Court has jurisdiction in all cases

[13] Crocker *v.* Marine National Bank, 101 Mass. 240.

[14] State *v.* Curtis, 35 Conn. 374.

[15] National Bank of Fairhaven *v.* The Phœnix Warehousing Co., 6 Hun, 71.

[16] Chesapeake Bank *v.* First National Bank of Baltimore, 40 Md. 269.

[17] Platt's Petition, 1 Ben. C. C. 534.

[18] Cook *v.* State National Bank of Boston, 50 Barb. 339, affirmed 52 N. Y. 96; National Park Bank *v.* Gunst, 1 Abb. N. Cas. 292.

[19] Price *v.* Abbott, 17 Fed. Rep. 506.

in which a national bank in the same district is a party, no matter who is the other, or what may be the subject matter.[20]

But beyond its district the national bank can sue only as any other individual may.[21]

As to jurisdiction of the Federal courts, a national bank is a citizen of the State where it is located.[22]

(*a*) **Attachments in State Courts.** — Under section 57, an attachment made by a State court against a national bank will be vacated if made before final judgment.[23] But it has been said that this rule applies only to actions brought against a bank in the State of its location, and not to cases where the bank is a non-resident of the State.[24]

Under U. S. Rev. Sts. § 5798, an attachment cannot be issued by a State court against a national bank, which is, or is about to become, insolvent.[25]

The last clause of Rev. Sts. § 5242, only applies to such national banks as have committed, or are contemplating, an act of insolvency, and does not prohibit the issuing of an attachment against the property of a solvent national bank, located and doing business in another State.[26]

United States. — The property of a bank cannot be sold on an attachment made after the bank became insolvent, when the same property is claimed by a receiver of the bank, who was appointed after the attachment was issued. The receiver may move to set aside an attachment in an action in which the property of the bank has been seized.[27]

New York. — Under the amendment of 1873, c. 269, § 2, providing that "no attachment," &c., the State courts are not prohibited from attaching the property of non-resident banks.

[20] Mitchell *v.* Walker, 25 Inter. Rev. Record, 64.

[21] St. Louis National Bank *v.* Brinkman, 1 Fed. Rep. 25.

[22] St. Louis National Bank *v.* Allen, 2 McCrary, 92.

[23] Central National Bank *v.* Richland National Bank, 52 How. 136.

[24] Southwick *v.* First National Bank of Memphis, 7 Hun, 96.

[25] National Shoe & Leather Bank *v.* Mechanics' National Bank of Newark, 89 N. Y. 467.

[26] Robinson *v.* National Bank of New Berne, 19 Hun, 477.

[27] National Bank *v.* Colby, 21 Wall. 609.

The clause relates only to actions against associations located where the suit is brought.[28]

Maryland. — An attachment was issued by a State court against a non-resident national bank, and another bank was summoned as garnishee. The court below quashed the attachment. On appeal, held that, under the amendment of section 57 by section 2 of the act of 1873, the attachment was void; that Congress has power to create national banks, and make any provisions which tend to promote their efficiency, and to protect them not only against State legislation, but also against suits or proceedings in State courts, by which that efficiency would be impaired.[29]

Whether the bank be a resident or non-resident, an attachment cannot issue until final judgment.[30]

Maine. — A national bank may attach the shares of its stock held by its debtor, in order to secure its claim.[31]

(*b*) **Injunctions against Officers.** — The Circuit Courts of the United States have power, upon a bill filed by a shareholder in a national bank, to enjoin the officers from transactions in violation of the requirements of their charter, and which cause a waste of the assets of the bank to the loss and injury of the complainant and other shareholders.[32]

(*c*) **Removal of Suits.**[33] — The fact that a national bank is defendant or plaintiff in a suit is not of itself a ground for removal from a State court to the Federal. Section 640 of the Rev. Sts. remains in force, so far as not repugnant to the act of March 3, 1875, and therefore national banks are expressly excepted from the right of removal.[34]

§ 159. **Criminal Cases.**[1] — Where an officer of a national bank embezzles a special deposit, though in the shape of money, he

[28] Southwick *v.* First National Bank of Memphis, 7 Hun, 96.

[29] Chesapeake Bank *v.* First National Bank, 40 Md. 269.

[30] Central National Bank *v.* Richland National Bank, 52 How. 186.

[31] Hagar *v.* National Union Bank, 63 Me. 509.

[32] Shoemaker *v.* National Mechanics' Bank, 2 Abb. (U. S.) 416.

[33] R. S. 640. §§ 57, 70, 82.

[34] Petillon *v.* Noble, 9 Leg. News, 314 (Biss.); Wilder *v.* Union Nat. Bank, 12 Leg. News, 75 (Biss.); Bird's Executors *v.* Cockrem, 2 Woods, 32.

[1] § 159. R. S. 5208, 5209, 5415. §§ 55, 59, 79.

is guilty of larceny, and, the national statute being silent as to this crime, he is amenable to the statutory provisions of the State where the bank is located.[2] But where a deposit is intended to be mingled with the assets, and become a part of the general property of the bank, and it is purloined by an officer of the bank, the offence is not one cognizable within the criminal jurisdiction of a State court.[3]

The courts of the United States being vested with the exclusive jurisdiction of all crimes which are punishable by the acts of Congress, an officer of a national bank who is guilty of embezzling the funds of the association does not come within the cognizance of the courts of the State where the bank is located.[4] Further, since by the act of 1864 the defaulting cashier of a national bank is guilty of a misdemeanor simply, therefore an accessory to the fact does not come within the statute provisions of a State which makes the act of the principal a felony.[4]

If an officer of a national bank is guilty of larceny, and not embezzlement, as where he purloins money from the bank at night-time, when such money is not intrusted to his keeping and he has no right of access to it, he will come within the jurisdiction of a State court, provided that the laws of the State where the bank is located make the offence charged against him larceny.[5]

Where the person is guilty of the larceny of bills or notes issued by a national bank, he may be indicted for the larceny of United States currency.[6]

Upon an indictment under section 55 of the act of 1864, the intent is conclusively shown upon proof of the defendant having actually committed the acts charged against him, and evidence of the motives or authority of the guilty party are not admissible in evidence.[7]

[2] State *v.* Fuller, 34 Conn. 280; Commonwealth *v.* Tenney, 97 Mass. 50.

[3] State *v.* Fuller, 34 Conn. 280.

[4] Commonwealth *v.* Felton, 101 Mass. 204.

[5] Commonwealth *v.* Barry, 116 Mass. 1; compare Commonwealth *v.* Felton, 101 Mass. 204.

[6] State *v.* Gasting, 23 La. An. 1609.

[7] United States *v.* Taintor, 11 Blatchf. 374.

If in an action for embezzlement under the U. S. Rev. Sts. § 5209, it appears that the funds of the bank have been abstracted or wilfully misapplied by the defendant, he is precluded from denying that it was done with unlawful intent. Congress intended to make criminal the conversion and misapplication of the funds, whether the party misapplying received any advantage or not.[8]

So also is he punishable, if, with intent to defraud the bank, he permits a firm of which he is a member to overdraw its account. There is no distinction between a loan made in bad faith for the purpose of defrauding the bank and a misappropriation in another form.[9]

Embezzlement by the cashier of a national bank is not a common law offence; it is punishable solely under the U. S. Rev. Sts. § 5209. The Pennsylvania acts of 1860, 1861, and 1878, relating to offences of bank officers, do not apply.[10]

A report of the condition of a national bank, made to the Comptroller of the Currency and verified by his oath, is a "declaration," within U. S. Rev. Sts. § 5392, as to perjury.[11]

A purchase of stock in violation of U. S. Rev. Sts. § 5201, if made with intent to defraud, and by an officer of the bank named in § 5209, is not punishable under § 5209.[12]

On same facts (between same parties) as to conspiracy, under § 5440, compare United States *v.* Britton, 108 U. S. 192, 199. It is not conspiring to commit an offence against the United States, if the president and a director conjointly cause shares of the bank to be bought with its money and held on trust for its benefit.

A director of a national bank, who, knowing that he has no money to his credit in the bank, and no right to draw money therefrom, obtains money from the bank to which he has no

[8] United States *v.* Lee, 12 Fed. Rep. 816.

[9] United States *v.* Fish, 24 Fed. Rep. 585.

[10] Commonwealth *v.* Ketner, 92 Pa. St. 372.

[11] United States *v.* Bartow, 20 Blatchf. 351.

[12] United States *v.* Britton, 107 U. S. 655; compare United States *v.* Britton, 108 U. S. 193.

right, by means of an overdraft, made with intent to defraud, and converts the same to his own use, in fraud of the bank, is guilty of a misapplication of the funds of the bank.[13]

McMillan, to secure a loan from a national bank, delivered to it the certificate of his shares of its capital stock, which, on his failure to pay, the bank sold at its full market value, and credited him with the entire proceeds. Held, that his administrator could not maintain an action against the bank to recover the proceeds. U. S. Rev. Sts. § 5201, prohibiting such loan, imposes no penalty.[14]

§ 200. **United States Collector's Right to inspect Checks.**[1] — Section 3177 of the U. S. Rev. Sts. authorizes a collector, deputy collector, or inspector of internal revenue, to enter buildings where any articles or objects subject to taxation are made, produced, and kept, so far as may be necessary for examining such articles and objects. It has been held that paid bank checks, properly stamped at the time when they were made, signed, and issued, are not articles or objects subject to taxation within the meaning of this statute, and the officials named have no privilege of entry into a banking-house for the purpose of examining such instruments.[2]

[13] United States *v.* Warner, 26 Fed. Rep. 616.

[14] First National Bank of Xenia *v.* Stewart, 107 U. S. 676.

[1] § 200. See § 80.

[2] United States *v.* Mann (United States Supreme Court), 17 Alb. Law Jour. 85. But, *contra*, see United States *v.* Rhawn, decided in U. S. Dist. Ct. East. Dist. Pa., 33 Legal Intelligencer, 258; Thompson's Nat. Bank Cas. 358.

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University Press, Cambridge: John Wilson and Son.